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SUMMARY RECORD OF THE 26th MEETING

Chairman:	Mr. TOMKA (Vice-Chairman)	(Czechoslovakia)
later:	Mr. ZARIF (Chairman)	(Islamic Republic of Iran)

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In the absence of Mr. Zarif (Islamic Republic of Iran), Mr. Tomka (Czechoslovakia), Vice-Chairman, took the Chair.

The meeting was called to order at 3.10 p.m.

AGENDA ITEM 129: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FOURTH SESSION (A/47/10, A/47/95, A/47/441-S/24559) (continued)

1. Mr. PUISSOCHET (France), referring to the question of international liability for injurious consequences arising out of acts not prohibited by international law, said that he would focus his remarks on the decisions taken in that respect by the International Law Commission. Noting that at the current stage of its work, the Commission had not yet been able to decide on the exact scope of the topic or on the conceptual obstacles encountered, he said that that was largely attributable to the overlap between the study being carried out by the Special Rapporteur and the question of State responsibility for wrongful acts, consideration of which should, in his view, be concluded first. Accordingly, he approved of the Commission's decision to proceed step-by-step, to establish priorities among the issues to be addressed, and to begin by considering the question of prevention.

2. With regard to the other facets of the issue, in his report the Special Rapporteur envisaged that, together with a set of rules calling on States to take unilateral measures of prevention by adopting regulations relating to their industrial or other activities likely to cause transboundary harm, another distinct set of rules should establish rules regarding the civil liability of private operators. Although that approach deviated from the mandate given to the Commission, it deserved attention, as at present, under the conventions in force regarding liability, primary liability in the case of harm was borne by the operator.

3. The Commission, which planned to focus successively on preventive and remedial measures - the latter, in its view, covering measures designed to mitigate the harm, measures intended to restore the conditions which existed prior to the occurrence of the harm, and pecuniary compensation - should indicate more clearly the need for a distinction, with regard to the second part of the question, between the possible - and no doubt residual - liability of the State and that of the operator. Once the study on prevention - and perhaps on measures designed to mitigate the harm, which had a different rationale although they could be of considerable practical importance - had been completed, the Commission should consider at greater length the general problems of liability for risk, in connection with the primary liability of the operator, rather than immediately drafting articles. Such consideration would be in line with principle 21 of the Stockholm Declaration or principle 13 of the Rio Declaration. Careful consideration of both the legal and the practical aspects of the issue was, however, clearly necessary before any thought was given to the general codification, or even the development, of the law in that sphere.

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4. Furthermore, with regard to the nature of the articles or the instrument to be drafted, his delegation took the view that it would be advantageous to take an immediate decision, as that would considerably facilitate the work. It was vital, particularly in a new sphere, to decide whether the aim was to establish obligations or recommendations. In the former case, a considerable effort would be required both to determine the scope of the obligations in question and their content and to examine their acceptability to States. In the latter case, it would be possible to be more general, and, perhaps, bolder, while remaining reasonable, as it would be the responsibility of States themselves to implement the proposed line of conduct, depending on the circumstances in each case. In that connection, his delegation considered that in the current state of international law, the most useful and constructive approach that the Commission could adopt would be to prepare something in the nature of a code of principles that might contain variants, to which States could refer when establishing specific regimes of liability in treaties. In the circumstances, the Commission should direct its efforts towards developing non-binding provisions for the draft as a whole, and not merely for the proposals relating to prevention.

5. Turning to the question of State responsibility, he doubted whether it was opportune to address the issue of countermeasures under that topic, as he was not convinced that countermeasures, which in some respects constituted means of enforcement, fell precisely within the scope of the question of State responsibility, even if they were linked to it. By broadening the subject, the Commission might find itself addressing particularly sensitive issues. It thus ran the risk of being led beyond the limits which it had itself set, by concerning itself with so-called "primary" rules - in particular, the definition of the areas in which countermeasures would be prohibited - or of being tempted to raise problems regarding the interpretation of specific treaties which should remain outside the scope of its study. There was a danger that consideration of the problem of countermeasures might delay the completion of the work. However, although his delegation considered that the issue should be addressed with great caution, it would examine with interest the texts which the Commission would prepare on the topic.

6. A number of general remarks were required. In the first place, it seemed essential to establish more clearly the exact scope to be given to the term "countermeasures". Article 30 of the draft articles on responsibility gave an indirect definition by stating under the heading "Countermeasures in respect of an internationally wrongful act" that "the wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act consitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State". However, in 1979 it had been pointed out that the wording of that article was vague and seemed to contain an inherent contradiction between the first part of the sentence, which used the term "wrongfulness" and the second, which referred to a "measure legitimate".

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7. The debates during the forty-fourth session of the Commission had given rise to divergent views on a fundamental issue. Some members of the Commission had stressed "that the notion of countermeasures was broader than that of reprisals and encompassed in particular retortion and more generally all the forms of lawful reaction to unlawful conduct". The fact that consideration had been given to excluding prohibited countermeasures, the withdrawal of ambassadors or the breaking off of diplomatic relations, might follow the same line of reasoning, if it implied that the acts in question should be considered "countermeasures" as defined by the draft. However, it seemed clear that the draft articles under discussion did not, and could not, seek, to regulate acts that were lawful per se. It was difficult to imagine, to use the same example, that the withdrawal of an ambassador could be preceded by compliance with the conditions set out in article 12. Accordingly, he shared the opinion of the members of the Commission and of the Rapporteur, set out in paragraph 150, that measures of retortion had no place in the draft. It was difficult to see why such a measure should be subject to a requirement of proportionality when it was in response to a wrongful act, and not when it was in response to an unfriendly act. Accordingly, it would be necessary to state explicitly, perhaps in a commentary, that in the event of a violation of their rights, States could freely resort to all licit measures, including retortion, which was in principle within their discretionary powers. Such a clarification would have the further advantage of drawing attention to the fact that means other than "countermeasures" could contribute to the restoration of law.

8. The second general remark concerned the fact that the Commission should refrain from taking any decision that would entail a conflict between the draft under discussion and the decisions reached at San Francisco since the Commission had no mandate to interpret the Charter. Although he readily agreed that armed reprisals were generally held to be prohibited by the Charter and that the requirements for self-defence were laid down in Article 51, he could not go along with some of the views and interpretations put forward during the debate. In his opinion, it would be counterproductive to ignore the scope of Article 103 of the Charter or to adopt positions tending to restrict the exercise by the Security Council of its primary responsibility for the maintenance of international peace and security.

9. Also from the general angle, his delegation believed that the aim of countermeasures was to bring about the cessation of the wrongful act, and that they were thus not of a punitive nature. In that connection, as the possible punitive nature of countermeasures had been linked to the notion of international crimes, he reiterated his delegation's reservations regarding the attribution of criminal liability to States.

10. With regard to the draft articles proposed by the Special Rapporteur and the discussions to which they had given rise, his delegation was in general agreement with the conditions for the legality of countermeasures, as set forth in draft articles 11, 12 and 13. In its view, countermeasures or

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reprisals - which could only be reprisals not involving the use of armed force - should not be considered, and had never been considered, to be unconditionally in conformity with international law. Any State which reacted to an initial violation of international law committed to its detriment by another State could not behave as it saw fit and disregard all its international obligations. In conformity with the Nausilaa ruling and the resolution adopted in 1934 by the International Law Institute, justification for an act was subject to the following conditions: a motive provided by a prior act, which was itself contrary to international law; the impossibility of obtaining satisfaction by other means; an unsuccessful sommation prior to the reprisal; proportionality between the reprisal and the injury.

11. Furthermore, the requirement that all amicable settlement procedures should be exhausted, although mitigated by article 12, paragraph 2 (b), was perhaps too strict, particularly in view of the time taken by certain procedures.

12. With regard to article 12, paragraph 2, his delegation could not fully subscribe to the observation that States could not resort to countermeasures once the Security Council had adopted sanctions under Chapter VII of the Charter. It was not clear on what grounds the intervention of an international body, regardless of the body concerned, would in itself exclude any possibility of countermeasures. Furthermore, it was in any event the responsibility of the Security Council to decide, if it so desired, whether or not its decisions excluded any others. With that reservation, article 12 could be revised along the lines indicated in paragraph 204 of the report (A/47/10).

13. The principle set out in article 14, that certain countermeasures should be prohibited, was acceptable to his delegation, which believed that such a prohibition was essential in cases relating to fundamental human rights, the rights of persons against whom reprisals were prohibited under the 1949 Geneva Conventions, and the inviolability of diplomatic and consular personnel and premises. However, despite the precaution taken by the Special Rapporteur to address only "extreme" acts, paragraph 2, raised a problem of principle in so far as it directly assimilated measures of political or economic coercion, the aim of which, in that context, would be to compel a State to comply with the law, to the threat of or use of force as defined by the Charter. It thus constituted an interpretation of the Charter, an exercise from which the Commission should refrain. It would seem more judicious not to attempt to address that problem, or in any case not on the basis of one of the principles of the Charter.

14. With regard to the question of so-called "self-contained regimes" (A/47/10, paras. 251 to 259), he said that it was not for the Commission to make any general abstract pronouncement as to whether States parties to a treaty that contained special rules concerning the consequences of the violation of their substantive obligations could, or could not, in certain

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circumstances, simultaneously or as a last resort, resort to countermeasures under general international law. The issue concerned the interpretation of treaties, a matter which was not within the competence of the Commission, or at least not within the framework of its current study, and which could result in a different response in each case. Clearly, the situation was not the same in the case of an instrument which contained extremely lax procedures regarding relations between the States parties and instruments, such as the treaties instituting the European Economic Communities, which, apart from being of a highly original nature, included a court of justice with jurisdiction to decide on the matter.

15. His delegation was gratified that the Commission had decided to devote the first two weeks of its 1993 session entirely to the work of the Drafting Committee on the question of "State responsibility". However, it was afraid that the urgency attached to the preparation of a draft statute for an international criminal court might disturb those plans.

16. With regard to the Commission's programme and methods of work, his delegation endorsed the suggestion made by the Commission that it should not, for the time being, pursue the consideration of the second part of the topic on "relations between States and international organizations" as well as the idea that outlines should be prepared of each of the topics likely to be the subject of a study in the long term. Noting that for the moment the Commission had put aside the possibility of dividing its session in two parts, he said that his delegation would be prepared to reconsider the matter favourably at the appropriate moment. As for the work of the Drafting Committee, his delegation noted that the different working languages would be represented "as far as possible". In view of the differences of terminology between the various languages, his delegation believed that it was important for all of them to be represented on the Drafting Committee.

17. The suggestions concerning the contribution of the Commission to the Decade of International Law were very timely, in particular - subject to budgetary considerations that might constitute a an obstacle - the suggestions concerning the publication of a series of articles presenting an overview of the main problems of international law on the eve of the twenty-first century, and the holding of a conference on international law.

18. Mr. AL-BAHARANI (Bahrain), taking up the question of State responsibility, raised the question of the legal rationale for countermeasures and noted that the ILC was divided on the point, as was evident from its report (A/47/10). According to one view, which was stated in paragraph 124, reprisals or countermeasures were the prerogative of the more powerful State, and many small States regarded the concept as synonymous with aggression or intervention. Thus, countermeasures had no place in the law on State responsibility. Another view, as stated in paragraph 131, was that at the present stage countermeasures were the only means whereby international law could be implemented when an international obligation was violated. To solve

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the impasse, his delegation would propose a compromise solution under which the legal regime of countermeasures would provide for checks and balances so that they were not punitive and conformed to the principles and purposes of the United Nations Charter.

19. Draft article 11 proposed by the Special Rapporteur should be improved considerably so as to fill the lacunae resulting from over-vague formulation and the absence of a definition of countermeasures excluding from their purview a punitive purpose. In his delegation's view, the draft article in its present form might open the way to abuse by the more powerful States, which were, as history showed, most likely to resort to countermeasures.

20. His delegation also considered that draft article 12 was unclear and should be further refined. There was a lack of consensus among members of the ILC on several of the conditions stipulated in it. It would be desirable to review article 12 with a view to arriving at a consensus on the conditions governing countermeasures which would balance the interests of the injured State and of the wrongdoing State.

21. His delegation supported in principle the precondition stipulated in paragraph 1 (a) as well as the exception provided for in paragraph 2 (a), but did not think it was either necessary or desirable to enter into details, as the present text did. It agreed with the Commission that the second precondition, prescribed in paragraph 1 (b), was satisfactory. On the other hand, it had reservations with regard to the "interim measures of protection" in paragraph 2 (b), as that might contradict the spirit of the conditions stipulated in paragraph 1 (a). It had no objections, however, with regard to paragraph 2 (c). As to paragraph 3, it concurred with the general perception of the Commission that it was unclear. Nothwithstanding the explanation given in paragraph 205 of the report, it was not convinced that the paragraph was necessary, especially as a qualification to an exception. In short, the Commission should revise draft article 12 so as to specify the preconditions in as clear and unambiguous terms as possible.

22. The formulation of draft article 13, embodying the rule of proportionality, raised some difficulties. The Special Rapporteur had indicated in paragraph 206 of the report that he had opted for a negative rather than a positive formulation. In his delegation's view, the positive formulation was preferable to the negative inasmuch as it helped limit the subjective element in assessment of the injury suffered. The central purpose of a countermeasure should be to redress the injury suffered rather than to enable the injured State to engage in retribution. His delegation was also not sure that it was really necessary to specify the elements of "gravity" and "effects" of the injury in the text itself. Those details, like others such as the importance of the interest protected by the countermeasures, could as well be mentioned in the commentary to the article. That was why his delegation proposed that draft article 13 should be replaced by the following text:

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> "Countermeasures taken by an injured State under Articles 11 and 12 shall be proportionate to the violation and the injury suffered".

23. Draft article 14 on prohibited countermeasures was probably the most important provision regarding the regime of countermeasures. There should be no doubt or controversy as to its scope and content as otherwise its purpose of prohibition would be defeated. The five kinds of prohibited countermeasures it dealt with did not have the same degree of intensity, the prohibition contained in (a) being of a more serious nature than those contained in paragraph (b). The question therefore arose of whether those prohibitions should all be in a single article and whether it was absolutely essential to have all of them. His delegation supported unequivocally the prohibition regarding the threat or use of force contained in paragraph 1 (a).

24. While his delegation was in agreement with the underlying idea of subparagraph (b) (i), it considered that the formulation lacked clarity and specificity. If the intention was to safeguard the "core" of human rights, it was better to specify the rights constituting that core. The subparagraph should at least define the threshold beyond which countermeasures could be allowed.

25. His delegation considered that the text of subparagraph (b) (II) was vague and misleading. It was doubtful that States should accept a restriction so broad. Moreover, it was not diplomatic operations as such that should be protected but the inviolability of diplomatic personnel and premises. His delegation would therefore suggest the modification of the text so as to restrict its application to inviolability of diplomatic personnel and premises.

26. His delegation considered that subparagraph (b) (iii) on jus cogens should be included in draft article 14, notwithstanding the fact that some or all of the preceding paragraphs contained elements of that postulate, as its retention might have a future use.

27. Subparagraph (b) (iv) contained sweeping formulations whose unreasonable effects were well described in paragraph 253 of the Commission's report. It was stated therein that the formulation seemed to deprive a State party to the International Covenant on Civil and Political Rights whose nationals were denied their freedom of movement in another State from the right to restrict the corresponding right of the nationals of the other State. His delegation considered that view unacceptable and urged the Commission to review the subparagraph.

28. His delegation felt that considerations of logic and principle necessitated the inclusion of draft article 14. In its opinion, it was logical that States should not be allowed to use political or economic coercion as a countermeasure. It therefore suggested that paragraph 2 should be combined with paragraph 1 (a) to read as follows:

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> "an injured State shall not resort, by way of countermeasure, to the threat or use of force or to political or economic coercion which endangers the territorial integrity or political independence or sovereignty of the wrongdoing State".

29. His delegation considered that there was no need to include article 5 bis to Part Two, as any injured State within the meaning of article 5 of Part Two would in law be entitled to take the remedial measures for redressal of the injury. If, after examining more fully the implications of article 5 of Part Two it was found that there was a lacuna, then the matter could be re-opened.

30. Mr. YAMADA (Japan), commenting on the question of State responsibility, said it was unfortunate that the Commission had not been able to take action at its last session on the articles formulated by its Drafting Committee relating to the substantive rights of the injured State and corresponding obligations of the author State which would form Section 1 of Chapter II of Part Two. It was, however, happy to note the desire of the newly composed Commission to accelerate the pace of work on the subject. His delegation did not wish to comment on the articles drafted by the Drafting Committee at its last session but hoped that the Commission would review them taking fully into account current State practices. It sincerely hoped that the Commission could expedite its work and provide the General Assembly with the detailed projected outline of the entire draft treaty so that the Assembly could make appropriate input to the future work.

31. On the issue of the legal regime of countermeasures, he considered that in the absence of enforcement mechanisms for international law countermeasures remained an effective instrument to deal with internationally wrongful acts. It was therefore more appropriate to regulate such countermeasures than to avoid the problem. As the question of countermeasures was closely related to the dispute settlement regime, it would be worthwhile for the Commission to examine the limitation of countermeasures and dispute settlement at the same time.

32. In formulating the limitations on countermeasures, the Commission must take care to maintain a proper balance between the rights and the obligations of the parties concerned. The conditions must not be too loose, which would open the way to abuse, or too restrictive, which would place an undue burden on the injured State.

33. Regarding the relationship between the draft under elaboration and the United Nations Charter, his delegation stressed that pursuant to its Article 103, the Charter took precedence over all international treaties. The decisions or recommendations of the Security Council or the International Court of Justice on a specific wrongful act would undoubtedly have great bearing on the right of the injured State to resort to countermeasures. That could only be determined, however, when the case was actually taken up by the

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United Nations, and it was therefore not necessary for the Commission to stipulate in its draft any limitations which might derive from United Nations action.

34. With regard to the question of the plurality of differently injured States, the Commission would have to study further the categories which might arise. Leaving aside violations of such norms as those relating to disarmament and human rights, which concerned the whole international community, it often happened that wrongful acts directed against a given State also injured third States, given the interdependence that characterized the modern world. The kind and extent of the countermeasures to be allowed to each category of injured State must be elaborated, taking into account the degree of injury and the objectives which the countermeasures were designed to attain.

35. Mrs. ŠKRK (Slovenia) said that, in establishing a regime of countermeasures, it would be illusory to ignore the national interests of States. Furthermore, all the safeguards concerning the sovereign equality of States must be respected.

36. The term "countermeasures" was to be preferred to the term "reprisals" because it did not imply any punitive measure on the part of the injured State. The sole aim of countermeasures should be to oblige the law-breaking State to respect an international obligation, contractual or non-contractual. Of course, the means of achieving that end could not be left to the sole discretion of the injured State.

37. Any action taken as a countermeasure to a wrongful act must be in full conformity with the rules of jus cogens. Her delegation endorsed the view of the representative of Denmark, speaking on behalf of the Nordic States, that the Commission should regard countermeasures as a concept that was applicable in time of peace, whereas the concept of reprisals in armed conflict was the subject of the rules of war and should be dealt with separately.

38. The Slovenian Government had not yet determined its position on the question whether countermeasures had a place in future international law on State responsibility. The elaboration of draft articles concerning the settlement of disputes in Part Three also needed to be stressed. A well-balanced system for the settlement of disputes should be the best means of safeguarding the interests of the injured State. In that connection, the Commission should not take a negative attitude towards retortion simply because it did not constitute countermeasures in the strict sense. On the contrary, if the injured State was convinced that it could attain satisfaction only through an unfriendly but not unlawful act, it should be encouraged to do so.

39. Her delegation accepted the idea that the injured State resorting to countermeasures should act bona fide, and also that the Commission should take

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into account the possibility of an injured State resorting to reprisals with malicious intent or committing an abuse of the right.

40. In her delegation's view, the conditions for resort to countermeasures envisaged in draft article 12 were not clearly exposed. As a number of delegations had noted, they should be more logically set out. The interim measures envisaged in the same article could lead to confusion. In general, countermeasures should be an exceptional interim instrument, only to be used if the wrongfully acting State failed to comply with the regular procedures for the peaceful settlement of disputes.

41. The concept of proportionality, envisaged in draft article 13, was one of the most sensitive issues in regard to countermeasures. The rule would inevitably create practical problems. In general, countermeasures should not be out of proportion to the wrongful act. It should be made clear, however, whether the degree of gravity of the act was to be measured by objective criteria or whether it could be left to the subjective assessment of the injured State.

42. The prohibited countermeasures listed in draft article 14 enshrined a "threshold" of permissiveness in contemporary international law. In her delegation's opinion, the list of prohibited countermeasures should be indicative, not exhaustive. There seemed to be a general agreement, with which her delegation concurred, about prohibiting the threat or use of force as a countermeasure. Countermeasures that violated fundamental human rights should also be prohibited. Similarly, the injured State should not be able to invoke the rule of reciprocity in order to justify countermeasures contrary to those fundamental rights. Countermeasures must not, therefore, be contrary to a peremptory norm of *jus cogens*. The fact that there was not yet in international law a complete system of *jus cogens* norms should not diminish the importance of *jus cogens* in any discussion of the issue of State responsibility.

43. The relationship between self-contained regimes and countermeasures required some further elaboration. The measures envisaged in those regimes could, however, be treated as *lex specialis* and given priority over the general regime drawn up by the Commission for countermeasures within the concept of State responsibility.

44. Lastly, on the question of situations where there was more than one injured State because of the infringement of an *erga omnes* obligation, it would seem that, in draft article 5 *bis*, the Special Rapporteur had recognized each injured State as having the right to resort to countermeasures. However, the *locus standi* of injured States had been treated in a rather restrictive way by international tribunals, including the International Court of Justice. That reservation required the approach adopted by the Special Rapporteur in that respect to be reconsidered.

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45. Mr. TUERK (Austria), noting that State responsibility was probably one of the most difficult questions of international law to codify, welcomed the very real progress made by the International Law Commission at its latest session. With a concerted effort, the Commission should be able to submit the end-product of its work on the subject to the international community before the end of its current members' term of office.

46. Turning to the substance of the topic, he said that the problem of countermeasures called for a number of comments.

47. On the question whether the draft should regulate countermeasures, his delegation was in agreement with what seemed to be the most realistic approach, namely that countermeasures were likely to survive in international relations for a rather long time. It would be unrealistic to believe that they could be abolished by a stroke of a pen in the foreseeable future, and it was therefore essential that there should be a precise set of international norms to prevent any possible abuse. Accordingly, his delegation could not agree to the exclusion of a provision on countermeasures.

48. As far as the use of terms was concerned, his delegation agreed with the view prevailing in the Commission that, although the measures in question in substance constituted reprisals, they ought to be referred to as "countermeasures", because the notion of reprisals should not be maintained in modern international law. In addition, the terminological distinction between "interim measures of protection" and "countermeasures" should be reconsidered and, if maintained, be made more comprehensible by clearly stating the difference. The Commission's report referred to "certain minimum preconditions" for interim measures of protection, and the question arose as to what was meant by those preconditions. Since no fundamental difference of content seemed to exist between "interim measures" and "countermeasures", the only apparent difference was the exemption of the former from the exhaustion of dispute settlement procedures established by draft article 12 (1) (a). It would be wiser to dispense all together with the notion of "interim measures as protection".

49. With regard to draft article 11, his delegation supported the approach taken, i.e., that the conditions for a lawful resort to countermeasures were the existence of an internationally unlawful act and the prior submission by the injured State of a demand for cessation or reparation. With regard to article 12, on conditions of resort to countermeasures, he noted that paragraph 1 (a) stipulated that all available amicable settlement procedures must be exhausted. That approach had been criticized by a number of members of the Commission. Paragraph 2 (a) of the same draft article, in addition, set out the requirement that the State which had committed a wrongful act must cooperate "in good faith" in the choice of amicable settlement procedures. Such a requirement was not an effective safeguard, as it would, in practice, be very difficult to demonstrate that, for instance, negotiations had been "unduly" delayed. The provision thus appeared unrealistic and invited transgressions, as measures taken might be labelled as "interim measures of

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protection" instead of "countermeasures". His delegation held the view that the proposal made in the Commission to make the exhaustion of amicable settlement procedures not a precondition for resorting to countermeasures, but a parallel obligation - in other words, to provide for a regime in which the right to impose countermeasures would be suspended if a wrongdoing State agreed to a dispute settlement procedure in which a legally binding determination as to the wrongfulness of the act could be reached and reparation required. Another solution might consist in the establishment of a time-limit.

50. As to draft article 12 (3), the Austrian delegation concurred with the view generally expressed in the Commission that the wording of the provision was unclear. The Special Rapporteur's explanation concerning the need for a provision of that kind seemed quite convincing, but the text as currently formulated did not seem to sufficiently reflect that explanation.

51. Turning to draft article 13, he said that his delegation shared the view of many members of the Commission with regard to the vague nature of the notion of proportionality and the difficulty of deciding, other than subjectively, whether a countermeasure was proportional to the wrongdoing. As had been stated in the Commission, if the countermeasure was to be proportionate to the injury, it took a punitive character, while the true criterion should rather be that a countermeasure would be necessary to bring about correction and recourse to a peaceful settlement procedure. That approach might offer a way for a more precise definition of proportionality, which was indispensable if the draft article was to be retained.

52. With respect to draft article 14, his delegation wondered whether the introduction of the notion of "fundamental human rights", in paragraph 1 (b) (i) - or "the core of human rights", as referred to by the Special Rapporteur - was a very happy one. One might sympathize with the idea that probably not all the human rights embodied at present or in the future in international instruments were necessarily exempt from countermeasures. A very convincing example - the freedom of movement - was given in the report in conjunction with the regulation of *erga omnes* obligations in paragraph 1 (b) (iv) of draft article 14. It would, however, appear that a more precise line of demarcation should be drawn between absolutely protected human rights and others that might legitimately become the object of countermeasures. Such a line of demarcation might be a reference to those rights from which no derogation was permissible under the relevant international human rights instruments, and such rights could under no circumstances whatsoever legitimately become the object of countermeasures.

53. As far as paragraph 1 (b) (ii) of draft article 14 was concerned, it was, in the opinion of the Austrian delegation, difficult to determine what was meant by the "normal operation of bilateral or multilateral diplomacy". The Special Rapporteur seemed to imply that diplomatic inviolability or immunity might become the object of countermeasures provided that the human rights of

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diplomats were not thereby infringed. His delegation shared the view expressed by several members of the Commission that countermeasures should not threaten the inviolability of internationally protected persons or premises. The breaking off of diplomatic relations would under that draft provision still be possible. Such a course of action could be legitimate under certain circumstances, but it should be recognized that such an act greatly affected the normal operation of bilateral diplomacy.

54. The discussion in the Commission concerning the proposed paragraph 2 of draft article 14 tended to confirm the view of his delegation that it would not be wise to reopen the discussion on the meaning of the term "force". His delegation would like to sound a note of caution with regard to the possible introduction of new elements into the United Nations Charter or trying to interpret or reinterpret it through the present set of draft articles. The suggestion - also contained in the report - to prohibit countermeasures which jeopardized the territorial integrity or political independence of States seemed to be the best solution since it was concurrent with the definition of intervention, the prohibition of which was considered to be part of jus cogens.

55. Concerning the question of countermeasures in the context of draft article 2 of Part Two, provisionally adopted, his delegation tended to support the view expressed by the Special Rapporteur that, in all cases, there was a "fall-back" entitlement to resort to the remedies provided for under general international law. His delegation also supported the request by the Special Rapporteur to amend draft article 2, because self-contained regimes did not completely replace the regime of State responsibility. That approach, however, also underlined the need to reach a more precise demarcation line with respect to human rights and diplomatic law.

56. With regard to draft article 5 of Part Two, provisionally adopted, defining an "injured State", and the proposed article 5 bis dealing with the question of there being more than one injured State, he said that his delegation held the view that the problems arising in that connection were genuine. A further in-depth discussion was required in the Commission, in particular in view of the fact that the concept of erga omnes obligations was still rather immature. The consequences of the proposed new article 5 bis needed to be carefully studied before the final position could be taken.

57. Addressing the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he thanked the Special Rapporteur for his continued efforts on that topic. The subject was particularly important since it raised many problems relating to the development of international environmental law. The extreme complexity of the issue became very clear from a reading of the relevant chapter of the most recent report of the International Law Commission. It would probably be very difficult to elaborate one single regime for the protection of the environment. A functional, sector-by-sector approach leading to separate instruments for different situations which would include applicable primary

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rules might be preferable to the commendable, but certainly ambitious, attempt to devise a unified legal regime.

58. His delegation shared the concern expressed by many members of the Commission that the theoretical and conceptual basis of the topic had not yet been clearly defined. That lack of definition had undoubtedly contributed to the fact that, after 14 years, the Commission had still not come forward with really tangible results. Austria appreciated the establishment of a Working Group by the Commission to consider the possible direction of the future work on the topic, as well as the decisions taken by the Commission, including its recommendations to the Special Rapporteur.

59. He wished to state once again his delegation's consistent position that the topic should cover the duty to avoid, minimize and repair physical transboundary harm resulting from physical activities within the territory or control of a State. Going beyond that would lead to almost insurmountable difficulties. It should also be borne in mind that the concept of liability for acts not prohibited by international law related to two fundamentally different situations which required a different approach. In one situation, it was a question of hazardous activities which involved a risk of disastrous consequences in case of accident but did not have adverse impacts in their normal operation. By its very nature, liability in such a situation must be absolute and strict, permitting no exceptions. However, the Commission must also envisage a fundamentally different situation: transboundary and long-range impacts on the environment. In that case, the risk of accident was only one, and even a minor, aspect of the problem. It was the normal operation of some activities that caused prejudice to the environment of other States. Moreover, that harm was not produced by a single, identifiable source, as in the case of hazardous activities; there was a multitude of sources which produced harmful effects through their accumulation. Liability therefore had two distinct functions: in the case of hazardous activities, it must cover the risk of an accident, but it must also, and that was its essential function, cover significant harm caused in the territory of other States through normal operation. Liability for risk must thus be combined with liability for a harmful activity.

60. At the current juncture of the debate on the topic, he wished to make just a few comments on some of the points raised in the Commission.

61. First of all, unlike some members of the Commission, his delegation did not believe that a civil liability regime where operators had to bear the cost of the harm they caused and an effective international insurance scheme would be sufficient. Such systems were certainly extremely valuable but they could not really guarantee adequate compensation under all circumstances to the innocent victims of such activities. Thus, civil liability should not entirely exclude the liability of States. Furthermore, the topic should not only apply to transboundary harm but should also cover activities causing harm to the global commons.

(Mr. Tuerk, Austria)

62. On draft article 1, relating to preventive measures, his delegation shared the opinion that it was only fair to require States to allow activities that had the potential of causing transboundary harm to be conducted only after reviewing their environmental impact assessment. In addition, the granting of permission to conduct such activities should not be considered an exclusively internal affair. Thus, prior consultation by the State of origin with the affected States before undertaking or authorizing an activity with harmful effects, as proposed in draft article 4, seemed very necessary.

63. In principle, his delegation was also sympathetic to the opinion that draft article 5 should state that, if the operator was unable to put forward acceptable alternatives, the State of origin could not authorize the proposed activities. Such a provision would, however, give a virtual veto to other States over a presumably lawful activity intended to be carried out in one State. It was doubtful whether States were at present ready to accept such a far-reaching limitation of their sphere of action, no matter how desirable it might seem to be.

64. Regarding the question of risk, the position taken by some members of the Commission on draft article 6 seemed realistic: neighbouring States should not have a veto over a State's projected activities, provided that appropriate procedures had been followed to minimize the risk of harm.

65. The Commission's decision that the scope of the topic should be understood as comprising both issues of prevention and of remedial measures, prevention being considered first, seemed reasonable to his delegation, although it circumvented the real problem, which lay in the topic's relationship with the topic of State responsibility. In the course of its work on the topic of international liability, the Commission must reach a conclusion on the issue of whether international law did or did not prohibit in principle activities that caused significant transboundary harm. If such a prohibition were to be found to exist, the matter should be dealt with under the topic of State responsibility and not separately.

66. As to the nature of either the draft articles or the eventual form of the instrument to be elaborated, it might be wise, at least in the first phase, to aim for a declaration or statement of principle. Only when a consensus among the members of the international community on the substance of such provisions seemed to be emerging would an effort to lay down binding rules have a reasonable chance of success. In the case in point, therefore, his delegation believed that the Commission should not wait until the completion of its work to take a decision in that respect.

67. Chapter V of the Commission's report, "Other decisions and conclusions of the Commission", was the shortest but by no means the least important: it provided the framework for the Commission's work and was thus of the greatest interest to the General Assembly.

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68. His delegation welcomed the appointment of Mr. Rosenstock as Special Rapporteur for the topic "The law of the non-navigational uses of international watercourses". The topic was particularly important, and Austria was convinced that Mr. Rosenstock would do everything in his power to ensure rapid progress in that field, continuing where his predecessor, who had done an excellent job in a relatively short time, had left off. Austria hoped that it would be possible to complete the second reading of the draft articles on the topic by 1994, as envisaged by the Commission.

69. His delegation had been pleased to note that the Commission shared the view consistently expressed by Austria in the Sixth Committee that the topic "Relations between States and international organizations (second part of the topic)" did not seem to respond to a pressing need of States or international organizations. The Commission's decision not to pursue that topic further during the current term of office of its members was certainly very wise. His delegation could not approve any decision to the contrary in the General Assembly.

70. In considering the work performed by the Commission at its forty-fourth session and the planning activities for the current quinquennium, his delegation had noted some welcome changes. It seemed that many of the comments made in the Sixth Committee by a number of delegations, including the Austrian delegation, on the Commission's working methods had been taken into account. Austria was confident that the Commission would be able to achieve the goals it had set itself for the current term of office of its members. Nevertheless, regarding one or more new topics, a note of caution should be sounded. It was certainly necessary to pursue the effort to identify topics which could be recommended to the General Assembly for inclusion in the Commission's programme of work, but actual work on such new topics should commence only when work on all, or at least all but one, of the topics currently on the Commission's agenda had been completed.

71. Regarding the choice of new topics, it was important to try to ascertain beforehand whether the subject matter really lent itself to codification and whether there was a reasonable chance that the product of the Commission's work would be accepted by the international community. In the past, that had not always been the case and a group of eminent international lawyers such as the members of the Commission could not be asked to work intensely for many years to no purpose. Extreme care must therefore be taken in choosing any new topic.

72. His delegation had noted with appreciation that the Commission had heeded the plea made by many delegations to reduce its report to more manageable proportions. Austria also welcomed the guidelines adopted on the preparation and content of the report. Lastly, Austria remained convinced that dividing the Commission's annual session into two parts would contribute to improving productivity. It hoped the Commission could reconsider the matter in due course.

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73. The International Law Seminar was a highly valuable institution for the training of young international lawyers, in particular from developing countries. His delegation therefore hoped that the Decade of International Law would prompt more Governments to make a financial contribution to the Seminar so that its scope could perhaps be expanded.

74. Mr. RIDRUEJO (Spain) said that the question of countermeasures had its rightful place in the legal regime governing the international responsibility of States. There was no denying that the most powerful and developed States would be able to take countermeasures more easily than smaller or less developed ones, but it should not be forgotten that countermeasures could also be applied among States of comparable might.

75. Although it was true that countermeasures could give rise to abuse, it was equally undeniable that States had always resorted to them and would continue to do so. In those circumstances the best way of guarding against abuse was strictly to codify the application of countermeasures.

76. His delegation shared the view of the Special Rapporteur that measures of retortion had no place in the draft being prepared: such measures were always licit, and as such were clearly distinguished from countermeasures. Regarding draft articles 11 to 14 as proposed by the Special Rapporteur, it would be necessary to review the wording of article 14, as the fact that the article explicitly referred to jus cogens rules could lead to interpretations a contrario sensu which would cast doubt precisely on the peremptory nature of those rules.

77. As to the relationship between the draft articles under preparation and the Charter of the United Nations, his delegation recalled that only decisions taken by the Security Council pursuant to Chapter VII of the Charter were binding. Where the settlement of disputes was concerned, the Security Council could only make recommedations and, pursuant to Article 40 of the Charter, call upon the parties concerned to comply with such provisonal measures as it deemed necessary or desirable. It was in that respect that the distinction between interim measures of protection and definitive measures acquired its full importance. As Article 103 of the Charter stipulated that the obligations of Member States under the Charter should prevail over any other international agreement, his delegation wondered whether it was advisable to retain article 4.

78. Regarding international liability for injurious consequences arising out of acts not prohibited by international law (chap. IV of the report), his delegation was gratified that the Commission had recognized the major role it had to play in the sphere of environmental protection. That was a sphere, in which State responsibility might be involved, either because of a violation of the primary rules of international law in which case the resulting responsibility was made clear in chapter III of the report, or because of a simple obligation to provide reparation, which was covered by chapter IV. For

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that reason, Spain had no objection to the Commission deciding to include in its future programme of work a topic entitled: "Legal aspects of the protection of the environment of areas not subject to national jurisdiction".

79. Another topic to which the Commission could devote its attention was the non-application of a number of conventions codifying or developing international law, and which, although formally adopted, had not come into force: one could cite in that respect the conventions on special missions, the representation of States in their relations with international organizations of a universal character, and succession of States. Lastly, his delegation thought that the task to which the Commission should give priority was the preparation of a draft statute of an international criminal court.

80. Mr. Zarif (Islamic Republic of Iran) took the Chair.

81. Mr. GOMEZ ROBLEDO (Mexico) introduced the document entitled "International responsibility of the State for wrongful acts (a historical and critical study)" (A/47/95). The study was a response to two essential concerns: it was designed first of all to make an assessment of the work carried out by the Commission since 1949 in the area of State responsibility, and secondly to inform the Commission of the position of the Government of Mexico regarding the progress made.

AGENDA ITEM 135: ADDITIONAL PROTOCOL ON CONSULAR FUNCTIONS TO THE VIENNA CONVENTION ON CONSULAR RELATIONS (A/47/327 and Add.1.; A/C.6/47/L.7)

82. Mrs. FLORES (Vice-Chairman, Chairman of the informal consultations) introducing the report on the informal consultations held on agenda item 135, "Additional protocol on consular functions to the Vienna Convention on Consular Relations", pursuant to General Assembly resolution 46/61, said that the report (A/C.6/47/L.7) summarized the results of each of the meetings held between the end of September and the end of October 1992. It set out the trends that had emerged and the main opinions expressed. As was apparent from paragraphs 11 and 12 of the report, two bodies of opinion had emerged but neither of them had commanded a consensus. For that reason, as stated in paragraph 13, in the absence of agreement on the substance as well as on the procedures to be followed, the participants in the informal consultations suggested that the Sixth Committee should recommend to the General Assembly that it should take note of the report. To conclude, she thanked the sponsors of the proposal, Czechoslovakia and Austria, as well as all the delegations which had taken part in the informal consultations.

83. The CHAIRMAN said that as no further delegations wished to take the floor, the Committee had thus completed consideration of agenda item 135. He understood that a draft resolution had been considered during informal consultations. Accordingly, he requested the Chairman for informal consultations to submit the draft resolution to the Committee as soon as possible.

The meeting rose at 5.15 p.m.

UNITED NATIONS
General Assembly
FORTY-SEVENTH SESSION
Official Records

SIXTH COMMITTEE
27th meeting
held on
Wednesday, 4 November 1992
at 10 a.m.
New York

SUMMARY RECORD OF THE 27th MEETING

Chairman: Mr. ZARIF (Islamic Republic of Iran)

later: Mr. TOMKA (Vice-Chairman) (Czechoslovakia)

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The meeting was called to order at 10.15 a.m.

AGENDA ITEM 129: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FOURTH SESSION (*continued*) (A/47/10, A/47/95, A/47/441-S/24559)

1. Mr. de SARAM (Sri Lanka), speaking on the topic of State responsibility and referring particularly to the question of countermeasures, said that article 30 of part one of the draft articles on the topic, in which the concept of countermeasures was first introduced, was based on relatively scant jurisprudential or other material. The question undoubtedly fell under the heading of progressive development rather than of codification of international law, and involved a fundamental dilemma as to the ways of ensuring, with due consideration of legal proprieties, that a State alleged to have committed an internationally wrongful act either proceeded to dispute settlement or acknowledged its wrong and made the necessary amends. The Special Rapporteur's view, which served as the basis for the draft articles proposed by him on the question of countermeasures, was that given the present relatively decentralized and non-institutionalized nature of the world community, and in the absence of well-developed international procedures to ensure observance of the law, it was necessary, albeit regrettably, that the future convention on State responsibility should allow an injured State to take countermeasures - or, in other words, to commit an internationally wrongful act against the State it believed to be responsible for the injury, the entitlement to take countermeasures being, of course, circumscribed by a number of qualifications and limitations. That view had been questioned by several members of the Commission who were not convinced that countermeasures were an appropriate means of coercing a State alleged to have committed an internationally wrongful act to go to dispute settlement or to acknowledge its wrong and make amends.

2. While Sri Lanka was not, at the present stage of deliberations, entirely committed to the latter view, it nevertheless felt that it should be given full consideration. The first question that arose related to the wording of article 30 of part one. The purport of the article seemed to be that although a countermeasure constituted a breach of an international obligation, the breach was, in the circumstances, not wrongful but, rather, legitimate. His delegation wondered why the reverse formulation - one placing the burden of proof upon the State taking the countermeasure - had not been adopted. The point was by no means a facetious or peripheral one. The location of the burden of proof was of enormous importance in an international dispute-settlement process because of the great difficulty of assembling the necessary testimony in international proceedings. Moreover, the other circumstances in which, under articles 29 and 31 to 34 of part one, wrongfulness would be precluded were objective circumstances which could be ascertained relatively easily. In the case of countermeasures, however, the traditional view was that a State incurring injury might rightly take a countermeasure merely on the basis of a bona fide belief that the State against which the countermeasure was to be directed had been responsible for

(Mr. de Saram, Sri Lanka)

the injury. To establish that a State had in fact not acted in such bona fide belief was often difficult or impossible. It therefore seemed likely that if article 30 continued to stand in its present form, a State taking a countermeasure might in many cases do so with impunity.

3. The assumption upon which article 30 and the Special Rapporteur's draft articles on countermeasures were based was that the countermeasures procedure was necessary in international relations in order to ensure that States complied with their international legal obligations. Against that view it might be argued that States usually did observe their international legal obligations, cases of non-observance being for the most part not deliberate, but due to genuine oversights, misunderstandings or differences of opinion. Moreover, the possibilities for effective bilateral or multilateral diplomatic protestations, as well as for measures of retortion not amounting to a breach of an international obligation, were not inconsiderable and, if resorted to, were likely to prove effective.

4. If, despite those and other possible objections, the countermeasures procedure was to be included in the future convention, it would, of course, be necessary to circumscribe it with a large number of qualifications and limitations. In that connection, he remarked that the issue of countermeasures that would not be permissible under any circumstances, dealt with in draft article 14 as proposed by the Special Rapporteur (A/47/10, footnote 48), came perilously close to touching upon some of the fundamental provisions of the Charter of the United Nations set forth, for example, in Article 2, paragraph 4, and Articles 51, 41 and 42. Complexities also arose in defining the circumstances in which countermeasures would be permissible in cases where more than one State considered itself to have been injured. The question of who the injured States were, the extent of their entitlement to have recourse to a countermeasure and the question of the countermeasure's proportionality, viewed not only individually but also collectively, would be difficult to answer with precision.

5. It should not be forgotten that those who would be principally called upon to implement the future convention were departments or ministries of foreign affairs, which were frequently understaffed and obliged to work under pressure. There was much to be said, therefore, for a convention whose provisions were as uncomplicated and unambiguous as possible.

6. Lastly, there were some general conceptual questions that could not be ignored. Given the present status of international law and of relations between States, and in view of their future development, was it necessary or justifiable to recommend to Governments the adoption of a provision under which a Government, thinking itself wronged by another State, might in effect take the law into its own hands and take a countermeasure rather than resort to dispute-settlement procedures, as Governments were urged to do on other occasions? Unquestionably, too, the ability to take effective countermeasures differed from one State to another depending on its size, wealth and strength.

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7. All those considerations tended to support the view that the countermeasure procedure, which might well have served a useful purpose in earlier times, was somewhat of an anomaly today - aside, of course, from self-contained treaty regimes which provided for countermeasures in the event of a breach of a treaty obligation. The question of countermeasures should be considered in relation to that of the settlement of disputes. It might be possible to expand existing dispute-settlement procedures to include additional and innovative ones so as to ensure that a State believed to be in breach of an international obligation did not evade settlement of the differences which had arisen. In that connection, reference might usefully be made to existing conventions in the environmental and other fields which included provisions on the monitoring of the fulfilment of treaty obligations by States parties. The concept of the interim measure of protection might also be developed to ensure that a State was in a position to preserve its interests against the consequences of a wrongful act by another State until such time as the differences that had arisen were resolved.

8. Mr. Tomka (Czechoslovakia), Vice-Chairman, took the Chair.

9. Mrs. FLORES (Uruguay) said that two of the main difficulties with the legal regime of countermeasures were the inability of domestic law to provide much assistance with respect to countermeasures, and the absence, in the international community, of any institutionalized remedies to be put into motion against a State which committed an internationally wrongful act. Consequently, the injured States were bound to rely upon their own unilateral reactions. A further question was whether countermeasures were compatible with modern international law. Some members of the Commission had adverted to the danger that more powerful States might impose their authority on weaker States through the use of countermeasures. The question had been further raised whether countermeasures were compatible with Article 2, paragraphs 3 and 4, and Article 33 of the Charter and modern international law, taking into account Article 103 of the Charter. Reference had also been made to the numerous General Assembly resolutions and the provisions of regional international instruments which expressly prohibited the use of reprisals, whether or not they involved the use of force.

10. Yet another question raised was whether the Commission should prescribe that an injured State might "take the laws into its hands". Concern had also been expressed that the very concept of countermeasures seemed to be antithetical to some fundamental principles, including the principle of sovereign equality of States, equality before the law, and the principle of peaceful settlement of disputes. An additional reason for concern cited was that countermeasures could give rise to abuse and start spirals of escalation detrimental to the stability of international life.

11. Many members, while recognizing that the question of countermeasures should be approached with great circumspection, felt that the Commission could not ignore the realities of international life, and should provide in the

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draft for a regime of countermeasures, since a certain degree of coercion had to be tolerated in any society, provided that it did not go beyond certain limits.

12. The regulation of countermeasures was viewed as a constructive way of promoting respect for the law as long as it aimed at eliminating their punitive component, compelling States to return to compliance with the law, and subjecting the underlying dispute to third-party settlement procedures. The objective of such an approach was to reduce to a minimum the scope of permissible unilateral initiatives.

13. As far as terminology was concerned, her delegation shared the view that the term "countermeasures", which was neutral and had been used by the Commission in article 30 of part one of the draft, should be given preference over the term "reprisals".

14. It should be pointed out that the wrongfulness of an act of a State was not precluded if that act was a consequence of an internationally wrongful act committed by another State. In draft articles 11, 12 and 13 of his fourth report, the Special Rapporteur had proposed certain conditions under which an injured State could lawfully resort to countermeasures. Draft article 11 defined those conditions as the actual existence of an internationally wrongful act, the prior submission by the injured State of a "demand" of cessation/reparation and the absence of an "adequate response". In her delegation's view, the injured State would thus be transformed into both judge and party, since it would itself determine whether a wrongful act had been committed. It would also determine whether the "demand" had been submitted, since the article provided no procedure for the objective evaluation of compliance with that condition. Finally, it was again the injured State which would decide if reparation had been made, thereby effectively determining the reparation. The determination of whether each of the conditions had been met could in turn give rise to disputes which could result in further wrongful acts. There might also be cases where there had been no prior wrongful act and the State which had made such a claim, as a result of which it had resorted to countermeasures, had thus committed two wrongful acts.

15. Paragraph 1 (a) of draft article 12 provided for the exhaustion of all amicable settlement procedures before an injured State had recourse to countermeasures. That condition could delay the attainment of some of the objectives sought through resort to countermeasures, particularly a rapid solution to the dispute. That was due to the fact that there were many procedures for the peaceful settlement of disputes; the provision did not establish an order of priority for implementing the procedures; and States were under no obligation to settle all their disputes by peaceful means, only those which could endanger international peace and security.

16. It was clear that where there was no will to settle it, a dispute could be prolonged indefinitely without resort to countermeasures. Also, it would

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be for the parties to decide whether the procedures for the peaceful settlement of the dispute had been exhausted. In such a case, the State which had allegedly committed the wrongful act and which considered that the procedures for peaceful settlement had not been exhausted could claim that the injured State was acting wrongfully by resorting to countermeasures.

17. The provisions of draft article 12 might mean that States parties to the 1948 American Treaty of Pacific Settlement would not be able to resort to countermeasures among themselves, for the Treaty did not provide that disputes submitted to procedures for peaceful settlement should be necessarily settled by those means. The draft articles should perhaps take account of that possibility.

18. Her delegation further noted that paragraphs 1 (b) and 2 (a) of draft article 12 could lend themselves to subjective interpretations. It also considered that measures of protection taken by an injured State were countermeasures and should not be the object of an exception. For its part, paragraph 3 of article 12 should be drafted with greater clarity.

19. Article 13 raised the problem of who would determine proportionality and on the basis of what criteria. Article 14 required more study; it was important to remove superfluous references and to introduce more specific terms.

20. Her delegation considered that the way to deal with the consequences arising from a wrongful act was not to commit another wrongful act. Efforts should be focused instead on the elaboration of an adequate system for the peaceful settlement of disputes. Furthermore, it should be a third party that determined the existence of a wrongful act, the measures to be adopted, and the proportionality of the response.

21. Mrs. GOLAN (Israel) said that her delegation considered the topic of State responsibility and its anticipated codification to be essential to the development of international law. Referring to the question of countermeasures and in particular to draft articles 11 to 14 and 5 *bis* proposed by the Special Rapporteur in his fourth report (A/CN.4/444 and Corr.1 and Add.1, 2 and 3), she said that her delegation agreed with the view that, owing to the complexity of the problem, it was questionable whether countermeasures had a place in the law on State responsibility. Further consideration by delegations and by the Commission was called for. The subject should be approached with extreme caution, emphasis being placed on the role of peaceful settlement of disputes, the promotion of respect for law and the avoidance of punitive action and abuse.

22. So far as terminology was concerned, her delegation agreed with the Special Rapporteur's view that, for the purposes of the draft articles, the notion of countermeasures was identical to that of reprisals, but felt that the term "countermeasures" should be given preference over the term

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"reprisals" as being more neutral and less associated with the use of force. Her delegation also agreed that a distinction should be drawn between crimes and delicts in the context of countermeasures, and that countermeasures should, at the present stage, apply only with regard to delicts.

23. Referring to draft article 11, she agreed with the remark made in the Commission and reported in paragraph 168 of its report (A/47/10) that a State which based its conduct on the existence of an internationally wrongful act acted at its own risk and might be held responsible if it turned out that none of its rights had, in fact, been infringed. With regard to draft article 12, her delegation felt that further elaboration was needed with a view to achieving a balance between the importance of controlling the use of countermeasures and the importance of not giving an undue advantage to the wrongdoing State. As for draft article 13, a more precise definition of the scope of proportionality was desirable.

24. Turning to paragraph 1 (a) of draft article 14, she said that her delegation, while agreeing with the Special Rapporteur that the concept of countermeasures differed from those of self-help, self-defence, state of necessity, humanitarian intervention and armed intervention for the protection of nationals, would prefer the paragraph to include a general reference to the Charter of the United Nations. In connection with paragraph 1 (b) (i) of the draft article, her delegation took the view that not every human right qualified as constituting an absolute limitation, and felt that the point should be further specified. With regard to paragraph 1 (b) (ii), its view was that the breach or suspension of diplomatic relations was a countermeasure often employed by States and should not be prohibited. In paragraph 1 (b) (iii), a reference to "basic rules of international law" would be preferable in view of the difference of opinion existing in relation to jus cogens. Her delegation accepted paragraph 1 (b) (iv), which provided a useful guarantee to third States.

25. Lastly, referring to paragraph 2 of draft article 14, she said that her delegation preferred the third alternative mentioned in paragraph 247 of the Commission's report prohibiting countermeasures which jeopardized the territorial integrity or political independence of States, without referring to political and economic coercion.

26. Mr. KRAICHITTI (Thailand) said that, owing to the imperfect nature of international law enforcement mechanisms, a State victim of an internationally wrongful act might, in certain exceptional circumstances, have no choice but to take unilateral action against the wrongdoing State in order to put an end to that wrongful act or to force that State to comply with international law. Where the injured State exhausted all peaceful means to attain that objective, it might need a legal basis for measures which it might take against the State that had committed the wrongful act.

27. In view of the unequal ability of States to take effective countermeasures, the Commission had to take the greatest care in determining

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the conditions for lawful resort to such countermeasures, in order to ensure that such inequalities among States did not unduly operate to the advantage of the strong and rich over the weak and poor. Given the paucity of State practice and judicial decisions on countermeasures, the attempt to codify or extract customary rules from existing practice must be carried out by taking into consideration the inequality of States. Otherwise, it might be viewed as an attempt to legitimize uncertain and controversial concepts by powerful States which could easily enjoy an advantage over weak or poor States in the use of countermeasures.

28. In order to prevent their possible abuse, countermeasures should be viewed as interim measures to secure the cessation of the wrongful act and compliance with international law, and must cease or be reversed once the purpose had been achieved. Countermeasures should not involve the use of armed force and should be distinguished from self-defence. In defining the regime of countermeasures, particular attention should be paid to the situation of weak, developing States, whose ability to take effective countermeasures differed quite obviously from that of developed States. The focus should be on the cessation of the internationally wrongful act and recourse to an agreed mode of settlement as the justification for countermeasures, which should not have any punitive function. Before taking any countermeasure, an injured State should exhaust all other available measures for the peaceful settlement of disputes, in accordance with the Charter. Such a provision was necessary in order to prevent the abuse of countermeasures by stronger States. Countermeasures taken by an injured State should be proportionate to legitimate aims, such as cessation of the internationally wrongful act and reparation. Excessive countermeasures might be tantamount to punitive measures.

29. In view of the paucity of State practice, his delegation shared the view that in developing the concept of countermeasures further, the Commission should identify and supplement the progressive elements which had emerged from recent practice in order to strengthen the safeguards against possible abuses of countermeasures.

30. Mr. MAMEDIAROV (Azerbaijan) said that, in a rapidly changing world, it was very important that international law should hold a respected place. The Commission must therefore continue to play its constructive, scholarly and independent role by directing its efforts towards the establishment of an international legal framework for future generations.

31. After 43 years, the Commission had made no substantial progress on the topic of State responsibility. That topic currently had a new urgency, for the world community was witnessing a number of serious armed conflicts, despite the end of the cold war. One example of such conflict was the military action perpetrated against his country by the Republic of Armenia in violation of the Charter and of the numerous General Assembly resolutions which provided for non-interference in the internal affairs of States.

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Indeed, the Republic of Armenia was openly supporting the separatist movement in Azerbaijan and was making aggressive claims on his country's territory. His delegation hoped that the completion of a final draft on State responsibility would be a major contribution to the stabilization of international relations, the disappearance of inter-State confrontations and the creation of a favourable climate among countries.

32. The draft articles should not be subordinate to the Charter or to any recommendations or decisions of the Security Council. They should, however, be in conformity with the rules and procedures of the Charter concerning the maintenance of international peace and security.

33. His delegation recognized that countermeasures reflected the incompleteness of international law. The law codified thus far by the international community did not provide any institutionalized remedies against a State that committed an internationally wrongful act. The injured States were bound to rely mainly, in so far as general international law was concerned, upon their own reactions. In its discussions on countermeasures, the international community should always take into account which acts of the wrongdoing States led the injured State to take countermeasures.

34. His delegation shared the Commission's view that injured States which took countermeasures were often themselves wrongdoing States, while the States alleged to be in breach of their international obligations were often themselves the victims of injustice. The Commission therefore had to exercise the greatest care in choosing the words used to describe the injured and wrongdoing States respectively.

35. With regard to draft article 12, which provided that an injured State should not resort to countermeasures until faced with the exhaustion of all the amicable settlement procedures available under general international law, the United Nations Charter or any other dispute settlement instrument to which it was a party, his delegation feared that the world community might face situations in which wrongdoing States continued their internationally wrongful acts indefinitely. His delegation was convinced, moreover, that draft article 12 was contrary to Article 51 of the Charter.

36. Ms. WILLSON (United States of America) said that, broadly speaking, the approach of the Drafting Committee on the topic of State responsibility appeared to be on target on the issues of cessation and reparation. She hoped that the Drafting Committee would complete its work on those articles during the first part of its session, and that the draft commentaries would be available to members of the Committee sufficiently early to make that possible.

37. On the subject of countermeasures, the starting-point must be the recognition of the fact that countermeasures were the means by which an injured State brought about cessation or an agreement to resolve the dispute peacefully. To place excessive burdens on the injured State would serve only

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(Ms. Willson, United States)

to strengthen the position of the wrongdoing State. Requiring, for example, the exhaustion of all other methods of dispute settlement as a precondition misperceived the important role of countermeasures in inducing agreements for the settlement of disputes. The Commission should also recognize that countermeasures must not be grossly disproportionate and that certain acts were impermissible in any circumstances. That did not mean that it was necessary or useful for the Commission to explore the notion of proportionality, the entire field of impermissible acts, the scope and authority of principal organs of the United Nations, or key principles of the Charter already dealt with in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States. Her delegation's reason for that view was not a desire to retain the artificial distinctions found in part one of the Commission's draft. Indeed those distinctions should be reconsidered before they were used as a basis for future work. The Commission should keep its work on the subject as simple and as narrowly confined as possible, in the interest of the expeditious elaboration of a text capable of widespread acceptance by States.

38. Likewise, the Commission should not base its drafting of part two on the assumption that it would be possible to obtain widespread acceptance of meaningful dispute-settlement provisions for the whole of international law. The realistic goal must be to seek the simplest possible treatment of the subject consistent with the existence of a regime that would encourage or induce States to settle their disputes in a peaceful and expeditious manner.

39. Her delegation urged the Commission to give sufficient priority to the topic in order to ensure that the first reading of all the parts would be completed in time for the Commission to review the whole, prior to submitting it for the formal written comments of Governments.

40. Ms. SEAGROVE (Australia) said that the issue of international liability for injurious consequences arising out of acts not prohibited by international law was of ever growing importance in a world where there was increasing concern about the protection of the environment. It was therefore crucial for the Commission to move towards concluding its work on that issue. In that respect, the question of determining when a State had an obligation to provide a remedy for damage was of great significance. It was therefore regrettable that the Commission was focusing on the issue of prevention, rather than on reparation and compensation for injury; the issue of prevention was relevant to the core issue of liability in only a limited number of cases.

41. Her delegation did not consider that liability was premised on the wrongfulness of the act causing the damage. Its position was supported by principle 21 of the Stockholm Declaration and principle 2 of the Rio Declaration, which related to cases in which it was unnecessary, in determining the question of liability, that there should be any wrongful act on the part of the State concerned. Her delegation had no theoretical difficulty with a legal regime which recognized that even if certain types of

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harm might not be the result of an unlawful act, compensation might still be required by law. That was the case in relation to the nationalization of property. A regime of strict liability could be an effective mechanism for achieving a balance of interests between the States concerned. It would be particularly useful in cases where the risk of damage could not be completely avoided by preventive measures, but nevertheless the world community recognized the desirability of the particular activity and did not condemn it as unlawful. It also had the benefit of forcing States to take into account the interests of innocent victims not under their jurisdiction or control when deciding whether to permit such an activity and how it should be regulated.

42. Her delegation believed that there was a need for a treaty setting down clear rules governing liability, but agreed that consensus might be more readily reached on guidelines or statements of principle in the first instance. The early development of such guidelines or statements of principle would assist in the further analysis of the issue in the many forums where it was currently under consideration. The formulation of such guidelines should not preclude further work by the Commission on drafting articles for a treaty.

43. On the topic of State responsibility, her delegation welcomed the Commission's desire to accelerate the pace of work, and hoped that a first reading of all draft articles would be completed by the end of the current quinquennium. The draft articles that had been provisionally adopted struck a reasonable balance between the various elements of reparation. However, since controversial issues still remained to be resolved within the Commission, it would be premature to consider them in the Committee at the current session. With regard to draft article 4, and the question raised by the Special Rapporteur on the relationship between that draft article and the Charter of the United Nations and recommendations or decisions adopted by the Security Council, her delegation did not believe that such questions needed to be resolved in connection with the draft articles. In any event it would be extremely difficult, if not impossible, to devise a formula which would apply to all cases.

44. Australia welcomed the steps taken within the Commission to review its programme of work in order to set priorities; it also supported the important interaction between the Commission and the Committee and hoped that it would be enhanced.

45. Mr. CALERO RODRIGUES (Brazil), referring to the topic of international liability, said that during the forty-sixth session, his delegation had been optimistic in its assessment of the progress made by the Commission in coming to an understanding of some fundamental issues which had hindered work on the topic. His delegation had believed that the Commission had established a clear basis for the elaboration of draft articles; that the drafting process could go forward without the hindrance of renewed debates on essential questions; that the scope of the topic had been satisfactorily defined to include both activities involving the risk of transboundary harm and

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activities actually causing such harm, thus justifying provisions on prevention and compensation; and that even if all the issues had not been fully resolved, the main thrust of the instrument to be drafted had been sufficiently delineated.

46. Unfortunately, the Commission's current report (A/47/10) clearly indicated that erroneous assumptions had been made. The Commission had not adopted any articles and had not even engaged in drafting. Old uncertainties seemed to have been revived and the climate of indecision which in the past had prevented the development of the topic threatened to return.

47. The nine articles on prevention proposed by the Special Rapporteur represented an attempt to revise previously submitted texts in the light of debates in the Commission and the Sixth Committee. The one new element was the Special Rapporteur's suggestion that the articles should be placed in an annex to the instrument so that they would be non-binding. That was based on the consideration that the majority view in both the Commission and the Committee favoured a separate instrument of a recommendatory nature on the "procedural", as opposed to the substantive, obligations of preventing transboundary harm (A/47/10, para. 283).

48. The recommendations of the Working Group (A/47/10, paras. 344 to 349) provided guidance for the next stage of the Commission's work. The Special Rapporteur was requested to examine further the issues of prevention, but only in respect of activities having a risk of causing transboundary harm. Prevention in respect of activities actually causing harm was not to be considered at the current stage. His delegation wondered whether there were sound reasons for not considering simultaneously all obligations of prevention, and believed that the differences between the two types of activities were not such as to warrant separate treatment.

49. With regard to the next stage of the work, paragraph 346 of the Commission's report stated that the Commission should deal first with preventive measures in respect of activities creating a risk of causing transboundary harm, and then with articles on the remedial measures to be taken when such activities had caused transboundary harm. In his delegation's view, once remedial measures had become necessary, the activity was to be considered not as creating a risk of causing transboundary harm, but as an activity causing harm. Brazil had always held that remedial measures should apply to all situations in which transboundary harm was caused, whether or not the risk of such harm being caused was known to exist. The undoing of the harm, through the restoration of the previous situation or through compensation, should be required whenever transboundary harm occurred. The basic principle, which the Commission had repeatedly reaffirmed, was that the innocent victim should not be left to bear the loss. The Commission's current work plan raised the possibility of the abandonment of that principle.

50. It was difficult to accept the view, stated in paragraph 344, that a final decision on the scope of the topic would be premature. After all, the

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topic had been under consideration by the Commission for more than 10 years. At the current stage, it would be retrograde for the Commission to adopt a piecemeal approach, leaving under a cloud of uncertainty the full development which it intended to give to the draft articles. It was to be hoped that the Commission would reconsider its position.

51. Mr. CORELL (Sweden), speaking also on behalf of Denmark, Finland, Iceland and Norway, said that the Nordic delegations noted the Commission's decision slightly to shift the emphasis in its further work on the topic of international liability. That new direction was reflected in the request that the Special Rapporteur for the topic, in his next report to the Commission, should examine further the issues of prevention only in respect of activities having a risk of causing transboundary harm and propose a revised set of draft articles to that effect.

52. It should be borne in mind that the Commission's work on international liability had begun as an offshoot of its work on the topic of State responsibility, and that the two topics were still interlinked. The current drafting exercise had a twofold objective: on the one hand, to prevent damage and to provide reparation when damage had occurred; and on the other, to agree on a framework for guaranteeing that innocent victims, whatever legal subjects they might be, were protected from the consequences of transboundary harm, and that prompt and adequate compensation was made for damage. The topic should thus be understood as comprising issues related to both preventive and remedial measures, but the latter should be dealt with by the Commission only at a later stage.

53. The Nordic countries were not fully convinced that that new direction was entirely logical or effective in all respects. While it made good sense to use the broader concept of "activities having a risk of causing harm" when the Commission discussed prevention, they were concerned that the separation of the issue of "prevention" from that of "remedial measures" might cause an undesirable delay. In their view, the two issues should not be treated separately.

54. Since the Commission had already worked for 14 years on the topic of international liability, most of the relevant concepts had already been aired more than once, and it was high time that the results of those deliberations were submitted to the Sixth Committee.

55. In view of the increasing number of international agreements which addressed the question of liability either directly or indirectly, it was to be hoped that the Commission could assist global or regional efforts to that end by providing a document which would contain the basic elements to be included in a legal framework. Such a document would make a much-needed contribution to the progressive development of international law, particularly at a time when the entire world was launching an offensive against environmental degradation.

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(Mr. Corell, Sweden)

56. The Nordic delegations had stated in the Sixth Committee on previous occasions that they would favour a binding framework convention on the subject. However, since the topic was so complicated, and was now a matter of some urgency, there was merit to be found in the idea that the Commission should elaborate a "declaration" or a "statement of principles" at the current stage. On the basis of such a document, it could then produce a more detailed instrument on international liability.

57. The Nordic delegations did not share the concern that the elaboration of a declaration or statement of principles could prejudice later steps to be taken by the Commission. There were many important precedents in the field of international law where a codification of legal rules had begun with the establishment of a declaration of principles, a manual or a memorandum of understanding. Their concern was rather that a confusing, and perhaps even contradictory, complex of law would develop if no general guidance was available.

58. Since demands for the attribution of international liability for injurious consequences arising out of acts not prohibited by international law were most likely to arise from situations in which the environment of a State might be affected, it would be a natural starting-point to take a closer look at the results of the United Nations Conference on Environment and Development.

59. In particular, the Nordic delegations were pleased to note that the international community had reaffirmed, in principle 2 of the Rio Declaration that States had the responsibility to ensure that activities within their jurisdiction or control did not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. By its unanimous adoption of the Rio Declaration, the international community had set the stage for the progressive development of international law regarding transboundary environmental issues.

60. On the basis of the Rio Declaration, the Sixth Committee was now in a position to give the Commission more specific guidance in respect of further work on the topic and the elements to be included in a draft document. The Nordic delegations considered that a declaration or statement of principles should reaffirm the commitment enunciated in principle 2 of the Rio Declaration. It should encourage States to enact and implement environmental legislation and to regulate potentially harmful activities in order to eliminate the risk of harm or reduce it to a minimum. It should urge States to develop national and international law regarding civil liability in order to complement State liability: such law should include non-discriminatory provisions on adequate compensation to innocent victims, as well as restoration. It should note that States were under the obligation to cooperate in an expeditious and more determined manner in further developing international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control

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to areas beyond their jurisdiction (on the lines of principle 13 of the Rio Declaration). It should note that States and peoples should cooperate in good faith and in the spirit of partnership in fulfilling the principles embodied in the Rio Declaration (as in principle 27).

61. A declaration or statement of principles should also recommend that States should establish procedures for environmental impact assessment, and apply that control instrument to all proposed activities which might have an adverse transboundary impact on the environment of other States. It should encourage States to develop procedures for prior and timely notification to potentially affected States, as well as procedures for consultation at an early stage and in good faith with those States. It should underline the importance of immediate notification to States of any emergency that might produce sudden harmful effects on the environment of those States. It should recommend that States should accept liability for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction. Acceptance of liability by a State for itself, or on behalf of its legal subjects, would provide a means of compensating innocent victims and of restoring the environment of the other State. It should encourage States to adopt domestic measures to provide for effective and non-discriminatory access to judicial and administrative proceedings, including redress and remedy. Lastly, it should stress, on the lines of principle 26 of the Rio Declaration, that States should resolve all their environmental disputes peacefully and by appropriate means in accordance with the Charter of the United Nations.

62. Mr. MIKULKA (Czechoslovakia) said that the slow progress so far achieved on the topic of international liability led his delegation to welcome the Commission's decision to establish an open-ended working group to consider certain issues regarding the scope of the topic and how it should be approached. At the current stage, work on the topic was concerned, on the one hand, with questions relating to prevention - in other words, a kind of code of conduct for activities which might cause or were causing transboundary harm - and on the other, with the question of liability itself in the event of harm. Bearing in mind the need to separate the issues involved so that the Commission could deal with them one by one, his delegation approved the Commission's decision to focus attention at the current stage on activities having a risk of causing transboundary harm, leaving until later consideration of other activities which in fact did cause harm. His delegation welcomed any initiative aimed at achieving a precise definition of the cases in which liability for risk could be envisaged. The Commission could have made even more progress in that regard, limiting the topic under consideration to activities involving exceptional risk.

63. Although the Working Group's decision that the topic should be considered as including both prevention and remedial measures, and that the issue of prevention should be examined first, represented a pragmatic approach, his delegation wished to reiterate that the question of prevention and that of

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remedial measures for transboundary harm caused by activities not prohibited by international law were distinct problems which were not from the legal standpoint conjoined. Indeed, the former might be considered to fall outside the scope of the topic, since non-compliance with the rules relating to prevention would entail State responsibility for wrongful acts within the terms of another topic which was also before the Commission.

64. At the same time, the elaboration of a set of rules concerning prevention represented an attempt to meet at least some of the needs of the international community, and the work already accomplished in that regard indicated that results could be achieved in a relatively short period of time.

65. From a theoretical point of view, his delegation wished to express its reservations with regard to the hypothesis put forward by the Special Rapporteur in paragraph 18 of his eighth report (A/CN.4/443), that transboundary harm caused by activities with harmful effects, when significant, was, in principle, prohibited under general international law, and that an activity of that type could exist only if there were some form of prior consent of the affected States. Such a hypothesis would entail a transition from the concept of liability to that of responsibility for wrongful acts, since prior consent would merely be a circumstance precluding wrongfulness within the meaning of article 29 of part one of the draft articles on State responsibility.

66. The hypothesis would merely lead to further problems, in that reparation for harm caused by an activity involving risk which was carried out without the prior consent of the affected State would be the outcome of an internationally wrongful act and would in consequence fall under the rules of State responsibility for wrongful acts. The harm itself, however, might arise even where the prior consent of the injured State had been given to an activity involving risk which was carried out in the territory of another State. In such a case the question of compensation would no longer be subject to the rules on State responsibility for wrongful acts, but would fall within the purview of liability.

67. In contrast to that hypothesis, the obligation to compensate for harm caused by an activity involving risk should be based on the principle of equity, namely the principle that the innocent victim should not be left to bear the loss.

68. His delegation shared the Commission's view that it would be premature to take a decision at the current stage on the nature of the articles to be drafted or the final form of the instrument.

69. For the time being, the Commission had decided to postpone further consideration of relations between States and international organizations. In fact, the topic did not seem to correspond to any pressing need on the part of either States or international organizations, and the prospects for the

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adoption of a further instrument in that connection might give cause for concern in view of the fact that the number of ratifications of the 1975 Convention on the Representation of States in Their Relations with International Organizations of a Universal Character remained extremely limited. His delegation hoped that that decision would enable the Commission to concentrate all its efforts on the other topics currently before it. At the same time, the considerable work accomplished by the two Special Rapporteurs would provide ample and instructive material for States and international organizations.

70. Turning to the question of the Drafting Committee's methods of work, and the changes concerning the preparation and content of the report to the General Assembly, he expressed the hope that the procedure recommended by the Planning Group would enable the Commission to identify, in 1993, topics likely to be recommended for inclusion in the Commission's programme of work.

71. Mr. YAMADA (Japan), referring to the topic of international liability, said that 13 years had elapsed since the Commission had received the preliminary report on the topic. If the Commission did not adopt a position on the subject without further delay its credibility might suffer. His delegation noted with satisfaction that the Commission had taken decisions at its forty-fourth session on such basic issues as the scope of the topic and the approach to be taken with regard to the nature of the articles or of the instrument to be drafted, and endorsed the Commission's view that, in order to facilitate progress on the subject, it would be prudent to approach its consideration in stages and to establish priorities for issues to be covered.

72. The Commission had also decided that the topic should be understood as comprising both issues of prevention and of remedial measures, but that prevention should be considered first; only after that, would the Commission proceed to the question of remedial measures. In that context, he drew attention to the Special Rapporteur's proposal, in paragraph 283 of the Commission's report (A/47/10), to place the articles dealing with both substantive and procedural preventive rules in an annex. Although it understood the considerations which had led to that suggestion, his delegation none the less felt that provisions on remedial measures must be an integral part of the instrument to be drafted.

73. On the other hand, his delegation appreciated the Commission's decision to deal first with activities creating a risk of causing transboundary harm, and then with activities causing such harm. Having completed the first stage of its work, however, the Commission should carefully consider whether articles on activities causing harm should be included in the instrument, as that might make its scope too broad.

74. Since the topic was related to that of State responsibility (A/47/10, chap. III), Japan had hoped that the work on international liability would take into account the progress made on State responsibility. In the light of

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(Mr. Yamada, Japan)

intensifying world-wide concern over the environment, his delegation recognized the growing necessity of establishing rules in that area. It was to be hoped that, in the course of future consideration, the relationship between international liability and State responsibility would be clarified not only conceptually, but also from a practical point of view.

75. Mr. FISSENKO (Belarus) said it was gratifying that in its work on the question of establishing an international criminal court, the Commission had begun with general questions of the desirability and feasibility of establishing such a court, since discussions in the Commission and the Committee and in academic journals had shown that there was no agreement with regard to the need for such a court. It was important to find answers to those general questions since they were bound to have an impact on individual questions of the structure, competence and procedure of an international court. In order to find such answers, it was necessary to consider the international crimes which the court would deal with; since there were various categories of international crimes and various components of such crimes, it was clear that various models of international criminal justice were needed. In different situations, an international court could be either the only resort, or an additional means of achieving justice.

76. The Commission had rightly taken the view that, at least initially, the court should exercise jurisdiction only in relation to individuals, and not to States, and that it should not have compulsory jurisdiction. That approach was based on pragmatic and realistic considerations; the court would clearly have to be developed in stages.

77. His delegation fully supported the Commission's approach that the question of establishing a court could not be resolved in the abstract, and that the drafting of the statute wouuld make it possible to find concrete solutions to specific questions. It agreed that an international court should have a statute in the form of a multilateral treaty concluded by States parties. However, it believed that the court should not be fettered in its action by the classical law of international treaties. The court would have to be fairly closely linked with the United Nations; many questions of its activity could only be resolved on the firm foundation of the United Nations and the powers and authority of its principal organs.

78. His delegation did not feel that there should be a direct link between accession to the statute of the court and accession to the Code of Crimes against the Peace and Security of Mankind, although some kind of link should be maintained between them so as to ensure that the court had a solid codified basis of law and the Code had an effective mechanism for implementation.

79. It was extremely important to decide whether the court would be a permanent or an ad hoc body. His delegation felt that it should be a flexible mechanism that could be brought into operation when the need arose. The Commission's conclusions, taking into account the views and proposals put

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forward in the Committee, could serve as a good basis for work on the topic in the future. The Commission should be given a renewed mandate by the General Assembly to draw up the statute of an international court.

80. On the question of State responsibility, it seemed that the main difficulty lay in the absence, in the international community, of effective institutionalized remedies against States which committed crimes. The injured State was normally compelled to rely on its own resources. The Commission should be particularly careful in formulating conditions and procedures for the lawful use of countermeasures, so as to try to level out the factual inequalities that existed between States. At the same time, the Commission should consider the question of establishing, developing and enhancing institutionalized means of legal protection.

81. There was no doubt that in any society, including the international community, a certain degree of coercion had to be tolerated. Countermeasures must be included in the draft articles, since they were virtually the only means of ensuring compliance with the norms of international law. His delegation agreed that countermeasures were a means of stopping unlawful conduct and encouraging a State which had committed an offence to respect the law, and were not punitive in nature. That was a significant point since, in relations between equal sovereign partners, no one State could pose as a higher authority.

82. Particular attention needed to be paid to the characteristics of countermeasures in relation to international crimes, as there was a significant difference between international crimes and international delicts. International crimes, as violations of the rights and interests of all members of the international community, required a collective response and must entail sanctions within the meaning of that term in the Commission's report (para. 149).

83. The application of countermeasures by the injured State was a necessity. However, such action must be carefully regulated, above all to ensure limits on its use. Countermeasures could not be considered lawful only on the basis of the bona fide conviction of the State in question. A combination of objective criteria was needed, above all refusal to have recourse to a settlement procedure. Meanwhile, the question of who could determine the existence of an internationally wrongful act and the question of the objective criteria necessary for the adoption of countermeasures remained open. One of the procedural conditions for the application of countermeasures should be prior notification of the alleged breach sent to the alleged wrongdoing State. That State needed to know that it had violated the law. The violation of the vital interests of the international community could not occur through negligence.

84. His delegation could support draft article 11. The current formulation allowed for the possibility of the provisional or long-term application of

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countermeasures, and there was no need to find a formulation to stress the provisional character of such measures.

85. It was highly important to take into account the condition of prior exhaustion by the injured State of all settlement procedures, as reflected in draft article 12. In connection with paragraph 1 (a) of that draft article, the final document adopted by the third meeting of experts of the Conference on Security and Cooperation in Europe on the peaceful settlement of disputes, held at Valetta in 1991, contained some useful ideas on the peaceful settlement of disputes. It would clearly be advisable to make provision for the possibility of applying countermeasures in cases where the peaceful settlement procedure did not lead to the settlement of a dispute within a reasonable period of time.

86. His delegation felt that the formulation of draft article 13 was somewhat abstract and needed to made more specific because of the excessive part played by subjective assessment by the injured State. The list of prohibited countermeasures in draft article 14 should be exhaustive, rather than indicative. The general principle that countermeasures should essentially affect relations between States and have a minimum impact on individuals was unrealistic. State responsibility was an example of collective responsibility, and it was not really possible to avoid the consequences of countermeasures for individuals.

87. The section of the report concerned with self-contained regimes was of particular interest to States that were members of the Commonwealth of Independent States, in view of the work that was currently under way to draft a charter for the commonwealth and establish a commission on human rights within it. His delegation fully supported the view that self-contained regimes did not preclude either the validity or the application of the rules of general international law. In its view, that principle should prevail in the process of interaction between the universal legal system and regional systems. It was rare for a regional system to be able to completely replace a universal system, particularly on the question of State responsibility.

88. The Commission should pay particular attention to the characteristics of countermeasures against international crimes in relation to the question of differently injured States.

89. Mr. ZAMORA (Venezuela), referring to the draft articles on State responsibility (A/47/10, chap. III), said that the question of countermeasures should be subject to a thorough analysis with a view to achieving the balance desired by the international community, in the light of the existing inequalities among States; in that connection, he concurred with the Special Rapporteur's observations, as set out in paragraph 124. With regard to draft article 11 as proposed by the Special Rapporteur, his delegation, while agreeing with the focus of the provision, believed that it should be redrafted so as to specify the scope of the harm caused to the injured State and the party which would be responsible for determining that such harm had occurred.

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90. Concerning draft article 12, his delegation supported the reference in paragraph 1 (a) to the amicable settlement procedures available under general international law, the United Nations Charter or any other dispute settlement instrument. With regard to paragraph 2 (a), however, the same comments applied as in the case of draft article 11; it was unclear who would be responsible for determining that a State had not cooperated in good faith in the choice and the implementation of available settlement procedures.

91. As to draft article 13, while his delegation endorsed the principle of proportionality between the proposed countermeasure and the harm caused, it felt that a more precise definition of the scope and content of proportionality would be desirable, as suggested in paragraph 211.

92. Lastly, with regard to draft article 14, his delegation, while generally endorsing the principles which it embodied, believed that a norm of that nature should be sufficiently broad to avoid giving rise to ambiguities and misinterpretations.

The meeting rose at 12.50 p.m.

UNITED NATIONS
General Assembly
FORTY-SEVENTH SESSION
Official Records

SIXTH COMMITTEE
28th meeting
held on
Wednesday, 4 November 1992
at 3 p.m.
New York

SUMMARY RECORD OF THE 28th MEETING

Chairman: Ms. FLORES (Uruguay)
(Vice-Chairman)

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AGENDA ITEM 129: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FOURTH SESSION (continued)

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The meeting was called to order at 3.20 p.m.

AGENDA ITEM 129: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FOURTH SESSION (*continued*) (A/47/10 and 95, A/47/441-S/24559)

1. Mr. DESCHENES (Canada) said that, without sacrificing the high quality of its work, the International Law Commission should find an approach to the topic of international liability for injurious consequences arising out of acts not prohibited by international law (A/47/10, chap. IV) that would allow it to advance more rapidly and achieve practical results, because the international community recognized the urgency of developing and codifying rules of general application on the matter.

2. Consequently, his delegation was disappointed by the Commission's decision regarding its future work on that topic. Although it was pleased to note that the Commission had decided that the solution would be to deal with both prevention and remedial damages, it was regrettable that remedial damages were to be discussed only once the Commission had completed its consideration of prevention. By deciding to draft articles in respect of activities having a risk of causing transboundary harm and not to deal at that stage with other activities which in fact caused harm, the Commission could well lose sight of the primary objective of the exercise: compensation for damages incurred and the elaboration of a regime of reparation, with appreciable harm as the primary factor triggering liability.

3. In 1988, Canada had agreed with the Special Rapporteur's three guiding principles: (1) the draft articles must ensure that each State had as much freedom of choice within its territory as was compatible with the rights and interests of other States; (2) the protection of such rights and interests required the adoption of measures of prevention and, if injury nevertheless occurred, measures of reparation; and (3) in so far as consistent with those two principles, the innocent victim should not be left to bear his loss or injury. Canada continued to believe that those principles struck a good balance between the right and the corresponding obligation of a State to be free to act, but not so as to cause injury to other States, and that those principles remained the foundation for the Commission's work.

4. Although the Working Group had decided to determine at a later date the nature of the draft articles and the eventual form of the instrument to be elaborated, his delegation felt that the Commission should be focusing on elaborating a draft convention. Although development of the law concerning international liability for injurious consequences arising out of acts not prohibited by international law was fraught with difficulty and complexity, the Commission should nevertheless be able to provide the solutions required by the international community.

5. Mr. TANG Chengyuan (China), referring to international liability for injurious consequences arising out of acts not prohibited by international law (A/47/10, chap. IV), said that his delegation did not object to the Commission's decision that the topic should comprise both prevention and remedial measures, but wished to stress again that failure by a State to take preventive measures or to take insufficient or incomplete preventive measures did not in itself entail liability. Otherwise, there would be no difference between the topic and that of State responsibility.

6. Also, China fully agreed with the Commission's decision to focus attention for the moment on drafting articles in respect of activities having a risk of causing transboundary harm by considering first the question of prevention and then that of remedial measures, and not to deal with activities which in fact caused harm until after having completed consideration of the former. On the other hand, the view of the Commission that it was premature to take a final decision on the nature of the instrument that would emerge from its work on the topic, while generally valid in the case of work involving codification was not applicable in the current instance, which was in the nature of a progressive development of international law. The issues involved were sensitive and complex and made it an extremely difficult task to formulate draft articles forming a convention that would be generally acceptable to States. The most prudent course would be a two-stage approach. As a first stage, the Commission should draft an instrument in the form of a declaration or of guidelines, on the basis of which the draft articles could later be cast in the form of a convention. To be overly ambitious regardless of the realities would be counterproductive, however good the intention. In view of the difficulty of the topic, the novelty of the concept and the divergence of views that had emerged, his delegation hoped that the Commission would study those suggestions and at the same time reconsider its decision, in order to conclude its consideration of the topic rapidly by presenting a set of draft articles acceptable to all States.

7. As to the draft articles specifically on prevention, his delegation agreed with the Special Rapporteur that they should be only in the nature of recommendations. In general, it would be useful to give further study to the appropriateness of having them serve as general rules applicable to all activities falling within the scope of the topic.

8. With regard to draft article 1, his delegation shared the view of some members of the Commission that the provisions on authorization and assessment were self-evident and in keeping with State practice. The environment, life and property of the inhabitants of the territory of the State of origin itself would be the first to be affected by the harm caused by activities involving risk as a result of accidents or other occurrences. States normally permitted such activities to be undertaken within their territory only with their prior authorization, and they set standards for assessing the potential socio-economic and environmental impacts. It was questionable whether the provision in draft article 1 for the assessment of transboundary harm was practical.

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9. It would not, on the other hand, be practical to make draft article 2 into a general rule. It was hard to see why a State would notify a potentially affected State when it knew in advance that the planned activity was going to cause transboundary harm. Draft article 2 would only serve to invite the affected State to veto the planned activity. Ordinarily, once the State of origin was aware in advance that the planned activity was going to have harmful transboundary effects, it took the initiative to have the plan changed. In respect of certain activities, the State concerned would make a point of declaring certain areas situated beyond the jurisdiction of States to be off limits for a specific period of time, and of warning foreign means of transport and personnel, in order to avoid any injurious consequences.

10. The purpose of draft article 4 was far from clear. As with draft article 2, if a State was aware that an activity that it had planned would cause significant harm, then it would not authorize it. On the other hand, if the transboundary harm arising from an activity was of a purely cumulative nature, it would then be not so much a matter for consultation, alternatives or settlement of disputes under articles 5 and 8, as one requiring international cooperation and good faith.

11. Finally, any prevention regime should take full account of the interests and particular situations of the developing countries. Indeed, in those countries, the activities concerned were often carried out by transnational corporations. Because they lacked the necessary scientific and technological know-how and financial means many developing countries were not in a position to control or regulate those activities.

12. His delegation sincerely hoped that the Commission would quickly complete its work on the topic so as to meet the pressing needs of the international community.

13. Mr. AL-BAHARNA (Bahrain) shared the opinion expressed by the Commission in paragraph 291 of the report on the work of its forty-fourth session (A/47/10), that successful work on the topic of international liability for injurious consequences arising out of acts not prohibited by international law would benefit all States and constitute a major contribution to the progressive development of international law and its codification. He also supported the Commission's decision (para. 344) to approach consideration of the topic in stages by establishing priorities for the issues to be covered, and its decision (para. 346) to deal first with preventive measures in respect of activities having a risk of causing transboundary harm. While that approach could appear somewhat doctrinaire and impractical inasmuch as there was a fine line between activities having a risk and those causing harm, the Commission would not experience too many difficulties in following that approach, as it had always worked on the assumption that the topic covered both types of activities.

14. With regard to prevention, his delegation was no more convinced than several members of the Commission (para. 296) that preventive rules should be

(Mr. Al-Baharna, Bahrain)

placed in an annex, separated from the main body of the text of the future instrument or that their character should remain recommendatory. Indeed, if prevention was to be considered the core of the topic, it should be elevated to the status of a principle having binding force. The Commission should therefore be urged to consider the preliminary question of whether preventive rules should or should not be binding in nature before starting to work out detailed rules on the subject. The need for an obligatory preventive regime governing accidents with international consequences had become an imperative in the aftermath of the Chernobyl and Rhine disasters.

15. With respect to the specific provisions discussed in the report, he observed that editorial changes were required in draft article 1 ("preventive measures") in order to remove any impression that interference in the internal affairs of States was authorized, and to clarify the purpose of the article, which was that due diligence should be observed by the wrongdoing State. In addition, the idea of establishing an insurance system, which had been suggested by some members of the Commission (para. 307), also deserved to be incorporated into the text.

16. With regard to draft article 2 ("Notification and information"), his delegation shared the views of those members of the Commission who supported it, subject to the reservation that the requirements of notification and information should become mandatory.

17. The Commission should probably reconsider draft article 3 ("National security and industrial secrets") to give members an opportunity to reflect on its implications for the prevention regime envisaged under the articles. Indeed, article 3 appeared to offer a loophole for States to escape from the obligatory prevention regime. In order to prevent such a situation, his delegation suggested, first, that the concepts of "national security" and "industrial secrets" should be duly qualified, and, secondly, that the latter part of the article, referring to information, should be strengthened so as to establish a proper balance between the imperatives of security and the provision of data and information pertaining to transnational harm. Subject to those caveats, his Government would support the text of article 3.

18. While he agreed with the criticisms that draft article 4 ("Activities with harmful effects: prior consultation") would give the affected State a veto in respect of activities with harmful effects, and that there was no valid reason for distinguishing it from article 6, he suggested that draft articles 4 to 6 should be streamlined in order to clarify the purpose of consultation, remove the "veto" idea and maintain a balance between the interests of the State of origin and the affected State or States.

19. His delegation would support draft article 7 ("Initiative by the affected States"), with the reservation that the requirement in the last sentence of the article should be deleted, as it might produce an effect contrary to what was intended.

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20. He was sceptical about the usefulness of draft article 8, relating to the settlement of disputes. Indeed, he wondered whether there was a need for the settlement of disputes if, by definition, the activities falling within the purview of the articles were not prohibited by international law.

21. Draft article 9 ("Factors involved in a balance of interests") was too important to be placed in a commentary, much less to be left out of the text entirely. If the Commission considered it desirable to place it in an annex, his delegation would support such a decision. He pointed out that article 5, ("Factors") in the Draft Articles on the Law of the Non-navigational uses of International Watercourses which the Commission had adopted, had been placed in the text itself. His delegation would, however, suggest that the Commission should review draft article 9 in the light of the changes that were to be made in the other articles.

22. Finally, the proposed new definitions for the terms "risk", "damage", "transboundary harm" and others in article 2 of the draft articles appeared to be too unwieldy and detailed for application. The definition of "risk" - which was the essential core of the topic - was a good example. The proposed definitions of risk and damage could be simplified by retaining the essential elements in the text and relegating the non-essential elements to the commentary. As for the definition of "transboundary harm", he believed that it should be expanded to include damage to the so-called global commons - whether or not the topic dealt with activities causing damage to the global commons - as transboundary harm inevitably affected the global commons.

23. In conclusion, he urged the Commission to accelerate the pace of its work so as to complete its consideration of the topic before the term of its present members expired.

24. Mr. KRAICHITTI (Thailand) said that, in view of the fact that present-day economic activities and technology involved considerable risk to human lives and the environment, the study that the International Law Commission had devoted to prevention in the context of the subject of international liability for injurious consequences arising out of acts not prohibited by international law (A/47/10, chap. IV) was most timely. His delegation considered that the regime of prevention should be applied only to activities which risked causing transboundary harm, and not to those which, in the normal course of events, actually caused, or had already caused, transboundary harm. Where the obligation to make reparation was involved, the latter two activities should be treated under the regime of State responsibility. A State might fail in its international obligations, by omitting to take the necessary preventive measures when conducting lawful activities involving a risk of transboundary harm, but it would not be obliged to make reparation as long as such activities had not actually caused harm to other States. The reason was that responsibility arose from a breach of international law, whereas the obligation to make reparation arose directly from the damage.

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25. His delegation found it difficult to accept that States had an obligation to notify their neighbours of their intention to undertake activities involving risk, particularly when that obligation might even render those activities subject to the approval of the neighbouring States. It would be wiser to oblige States to provide any State so requesting with assurances that adequate preventive measures had been taken in compliance with their international obligations.

26. In drafting the article dealing with the prevention rules, the focus should be on determining minimum standards and the degree of vigilance required of States conducting activities involving risk. In so doing, account must be taken of the following factors: the stage of economic development of the country conducting the activities, a balance of interests, the importance of the activities to the economic development of the country of origin, and the existence of possible alternatives.

27. The draft article did not distinguish between activities conducted by the State itself and those conducted by private operators. A distinction should be drawn between those two types of activity, as well as between the nature and scope of the obligation to make reparation of both types of operator, in cases where transboundary harm might occur.

28. With regard to the other draft articles prepared on the same subject, his delegation regarded article 1 as fair and reasonable. To require States to adopt legislative, administrative or enforcement measures should not be regarded as interference in the internal affairs of States. Article 2, however, served no useful purpose, and was impractical. For if an activity had a risk of significant transboundary harm, it would be a wrongful act and the State of origin should refrain from doing it anyway. To extend the scope of the article to that type of activity would be to contradict the title of the topic, which dealt only with activities not prohibited by international law. It would be unreasonable to expect States to refrain from undertaking lawful activities because their assessment of those activities revealed possible transboundary harm, particularly in cases where such activities were considered essential to the development of that State and where there was no alternative.

29. Similarly, the purpose of articles 4 to 8 also seemed unclear, and their provisions impractical. If a State envisaging activities involving risk chose not to notify its neighbours of its intention, it could hardly be expected to consult the States likely to be harmed by those activities. Article 9, however, served a useful purpose, in setting forth the criteria for assessment of the rules of prevention and the degree of vigilance required of States conducting activities involving risk.

30. Thailand considered that it would be futile to adopt articles dealing with prevention that were not binding in nature. If they were to be binding, they would have to take the final form of an international convention. His

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delegation also welcomed the Commission's decision to focus at that stage only on the articles dealing with activities involving a risk of transboundary harm, and not on those which in fact caused such harm.

31. Mr. GODET (Observer for Switzerland) noted that the members of the Commission were still broadly divided on the fundamental questions underlying the subject of liability for injurious consequences arising out of acts not prohibited by international law (A/47/10, chap. IV). The Swiss delegation supported the idea of introducing a regime of international liability based essentially on the occurrence of transboundary harm resulting from a dangerous activity. A regime of objective liability should not go so far as to impose on the State of origin a primary obligation of reparation, and liability should be invoked only when the author of the harm suffered did not comply with its duty to make reparation.

32. The Swiss delegation welcomed the Commission's decision to give priority to consideration of the question of prevention, before turning to the means of remedying damage. That being said, in cases where transboundary harm nevertheless arose, compliance with the obligation of prevention should not have the effect of diminishing the subsidiary obligation to make reparation to the State in question.

33. Without calling into question the Commission's decision on that subject, his delegation nevertheless considered that activities involving risk and activities with harmful effects were subject to the same regime of prevention: at that level, there was no fundamental difference between the two types of activity.

34. With regard to the nine new draft articles that the Special Rapporteur had submitted, his delegation would confine itself to some general remarks on the articles on prevention in the case of activities involving risk. Draft article 1 was entirely satisfactory; for it was not superfluous to remind States that the occurrence of transboundary harm resulting from dangerous activities carried out under their jurisdiction or control might entail their liability, a corollary of sovereignty. The main thrust of draft article 2 was worthy of retention, for it seemed desirable that a State which, having examined the socio-economic and environmental incidences, authorized an activity involving risk on its territory should communicate the results of that study to the States likely to be harmed by the activities envisaged. The exception provided for in draft article 3 was justified, and might prove of value, provided that States did not abuse it.

35. Regarding draft article 6, which, according to the commentary, should be redrafted, his delegation considered that, without seeking to attenuate the need for prevention, care must be taken to ensure that the new version did not lead to imposition of a systematic requirement for any State envisaging an activity involving risk to consult all States potentially affected. That would be tantamount to conferring the right to veto dangerous activities

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undertaken in the State of origin on any State claiming to be exposed to risk. Conferral of such a right would be unwarranted.

36. The same reservation applied to draft article 7, which was intended to grant a potentially affected State the right to request consultations or even negotiations with the State of origin. Moreover, the obligation set forth in the last part of the article and the reference to draft article 2 were of little value. It would perhaps be preferable to incorporate the question of initiative by the affected States into article 6, instead of devoting a separate provision to it.

37. The fundamental character of draft article 8 was not in question. Given the danger of activities posing risk, it was essential to work out procedures for the settlement of disputes. A suitable settlement procedure should preserve the right of each party to appeal unilaterally to a third party, in the event of the failure of negotiations. The decision by the third party should, if possible, be binding.

38. While draft article 9 might prove to be of use to States during consultations, the factors involved in a balance of interests, as set out in the article, should be merely in the nature of guidelines or recommendations so that States would be free to apply other criteria, depending on the activity undertaken or envisaged.

39. In conclusion, his delegation stressed that, while the definition of risk was acceptable in substance, the complicated and, at times, imprecise wording needed to be improved. In respect of the concept of damage, the new formulation was based largely on that used in the draft convention on civil liability for damage resulting from environmentally dangerous activities, and constituted an excellent starting-point for the Commission's future work.

40. Mr. AL-KHASAWNEH (Jordan) said that, in his view, State responsibility occupied a central position in the system of international law. His delegation welcomed that fact that the Drafting Committee had adopted on first reading the six draft articles relating to the substantive consequences of internationally wrongful acts (A/47/10, chap. III).

41. With regard to the complex and controversial question of the instrumental consequences of internationally wrongful acts, his delegation did not favour the complete deletion of the articles relating to that matter. It would be unrealistic to believe that by removing any reference to countermeasures from the draft, they would disappear from international relations. The moral and legal dilemma of countermeasures was not unlike that which had arisen at the time of the codification of humanitarian law. The similarity was based, in particular, on the central role of the concept of proportionality, the inadequacy of which was apparent to all. Since that concept offered only illusory guarantees, it was important to learn from the lessons of the past and place more stringent conditions on the admissibility of countermeasures.

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42. In that connection, his delegation believed that it was vital to include in the draft a procedure for third party settlement of disputes. It agreed with the Special Rapporteur that "any regulation of countermeasures which did not go hand in hand with dispute settlement procedures was fraught with the danger of abuse to the detriment of weaker and poor States" (para. 163).

43. An attempt should also be made to specify more precisely the cases in which resort to countermeasures was strictly prohibited. That was the subject of draft article 14, which defined five areas in which countermeasures were prohibited. In his delegation's view, however, there was room for improvement in that categorization, through either amplification or, where necessary, the addition of new categories. It might be useful, for example, to determine whether, as his delegation believed, property rights should be considered as fundamental human rights and, as such, protected absolutely against countermeasures. Similarly, it might be necessary to give separate treatment to treaties establishing boundaries and those containing termination or suspension clauses which were envisaged as countermeasures. His delegation believed that the inadequacies of the concept of proportionality might be offset by the inclusion in the draft of formal prohibitions.

44. With regard to draft article 12, his delegation agreed with the view expressed by the representative of Austria that the exhaustion of amicable settlement procedures should be a parallel obligation rather than a condition to be met before any resort to countermeasures. It would be better to provide for a regime under which the right to resort to countermeasures would be suspended if the wrongdoing State agreed to a dispute settlement procedure which could give rise to a legally binding determination on the wrongfulness of the act and the question of reparations. The wording of paragraph 3 of the article was not at all clear, as the Special Rapporteur himself had admitted.

45. As for the question of countermeasures in the context of "self-contained" regimes, it was impossible to settle it by asserting that it was a matter of treaty interpretation. Such regimes had special characteristics, as defined by the Special Rapporteur (para. 251). In any event, the question merited further reflection in the light of the tendency, in the area of State responsibility, to establish different regimes for different types of responsibility. In addition, when in the context of a treaty regime, States stipulated the consequences of any violation of that regime, it should be understood that those States thus expressly excluded any other measure under any other system and that, if their intentions were not clear, the presumption should be in favour of the exclusion rather than the inclusion of external measures.

46. On the question of differently injured States, his delegation believed that article 5 bis should be supplemented by a provision specifying that the capacity of differently injured States to take countermeasures should be proportional to the degree of injury suffered by the State taking the measures. In that connection, the assessment of what constituted a

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proportional response was made even more complicated by the fact that the State applying the countermeasures had to take into account the measures taken by other injured States. His delegation also believed that if the State or States most affected failed to claim restitutio in integrum, no other State should be able to do so.

47. With regard to the relationship between the draft articles under elaboration and the Charter of the United Nations, his delegation fully agreed with the Special Rapporteur that the unqualified reference to the provisions of the Charter concerning the maintenance of international peace and security would not necessarily be appropriate in order to implement the rules of a convention on State responsibility with due regard for the equality of States and the rule of law in international relations.

48. Mr. OSHODI (Nigeria) said that the Commission had requested a clear indication as to whether it should embark on a draft statute of an international criminal court. Many issues remain unsolved in the international criminal system relating to the definition of offences and of penalties that would arise from such offences. Nigeria had already stated its preference for the Commission first completing the draft Code before considering the question of a criminal court. He was gratified that the Commission had already adopted on first reading the draft articles which had been sent to Governments for comments and observations. Nigeria would take part in all efforts that would enhance and strengthen the international legal order by ensuring that those who committed serious offences against the peace and security of mankind were held fully accountable for their crimes. It would join in any consensus on a draft statute that would attract a broad majority of States. However, the Commission should adopt a flexible approach which would lead to agreement. Nigeria accepted the proposal to extend the Commission's mandate to prepare a draft statute.

49. Nevertheless, his delegation wished to make a number of more detailed observations on the proposed statute. First of all, the court should be established by a statute in the form of a treaty agreed to by States parties. Secondly, financial considerations should not impede the creation of a permanent institution. There was no need for a large court, and at the initial stage a permanent structure could be envisaged that could develop gradually as the need arose. Lastly, it would be preferable for the court to have exclusive jurisdiction over certain international crimes and concurrent jurisdiction over others. There would be no difficulty in the court having jurisdiction over certain crimes of an international character defined in international treaties, inter alia, the Code of Crimes Against the Peace and Security of Mankind.

50. In any event, it was important that the relationship between the Code and the court should be clearly defined, especially since there was no need for a Code without a court to enforce it. Nigeria's preference was for an open linkage. However, as a compromise, it supported the flexible approach of making the draft Code and the statute of the court separate instruments.

(Mr. Oshodi, Nigeria)

51. The Commission must consider and resolve the conflict of interests that would arise between States in whose territory the crime had been committed, the State that had custody of the accused, the State whose nationals were the victims of the crime and the State of which the accused was a national. It would be highly undesirable if the jurisdiction of the international criminal court were to be ousted by the State in which the crime had been committed or by the victim States. Accordingly, Nigeria favoured a situation in which the international criminal court would be seized of a matter by the State with custody of the accused and which had jurisdiction over the offence under its domestic law or under international law. Moreover, the court could enter into an agreement with the United Nations, as a specialized agency. That would provide it with the possibility of utilizing the registry services of the International Court of Justice or the United Nations Legal Counsel's office.

52. The question of the law to be applied by the international criminal court would be crucial to its success. Its jurisdiction should be limited to offences which were genuinely of an international character as defined by treaties in force. However, most treaties were silent about defences and extenuating circumstances, such as the age of criminal responsibility, mental state, duress, self-defence, insanity and the like. If necessary, resort could be had to the domestic law of the State on whose territory the crime had been committed, or of the State which had jurisdiction to prosecute the criminal. Such a system would have the disadvantage of a lack of uniformity, although it would be consistent with the traditional territorial nature of criminal jurisdictions.

53. There was bound to be controversy surrounding the range of punishments that could be imposed by the court. It was possible to doubt whether it would be justified to confer on a strictly criminal proceeding the power to award claims for damages. The imposition of fines and the forfeiture of the proceeds of crime seemed more appropriate than the award of damages in the form of compensation.

54. His delegation supported the observation made by the Commission in paragraph 504 of its report, and considered it essential that accused persons should receive a fair trial. The court should adhere to the highest standards and under no circumstances try defendants in absentia. Prosecution before the court should be by an independent standing prosecutorial organ, or by an interested State as the need arose. Such a solution would incorporate the procedure adopted by both the civil and common law systems, especially if the accused were entitled to a preliminary hearing before a panel of the court to determine the merits of the case.

55. States should not refuse to hand accused persons over to the court on the grounds that their crime was political, or simply on the basis of their nationality, although the court should only try persons who were lawfully brought before it. A general provision for assistance could be inserted into the court's statute stating clearly under what circumstances assistance should be granted or denied.

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(Mr. Oshodi, Nigeria)

56. Turning to the issue of State responsibility (chap. III) he said that the Commission should take advantage of the favourable circumstances created by the disappearance of the ideological confrontation to complete the preparation of the draft on State responsibility. Codifying the issue of reprisals or countermeasures was not an easy task and, as had already been mentioned, the rich and powerful countries could easily take advantage of the weak and poor ones. That was a problem which the Commission should constantly keep in sight.

57. As far as the issue of self-contained regimes was concerned, Nigeria was more inclined to agree with the proposition that "external" unilateral measures should be resorted to only in extreme cases (para. 256). The procedure provided for in international treaties in force should take precedence over the right of States to resort to countermeasures under general international law.

58. The power of decision of the Security Council was strictly confined to measures aimed at restoring international peace and security under Chapter VII of the Charter, and the Council was not empowered to impose on States settlements or settlement procedures in relation to disputes or situations dealt with in Chapter VI, on which it could only make recommendations. Nigeria favoured retaining draft article 4, but deleting the words "as appropriate", which subordinated the provisions of the draft to those of the Charter of the United Nations. It also approved draft article 5, already adopted by the Commission, and saw no need for draft article 5 *bis* as suggested by the Special Rapporteur.

59. To conclude, he said that his delegation had taken note of the progress made by the Commission in its work on the topic of international liability of States for injurious consequences arising out of acts not prohibited by international law (chap. IV). It had also noted that the Commission intended first of all to consider the question of preventive measures before deliberating on remedial ones. In his delegation's view, that should not relegate into the background remedies aimed at mitigation, restoration and compensation.

60. Mr. NASIER (Indonesia) said that as a result of the historic transformations on the international political scene in the post-cold-war period, respect for international law in inter-State relations was the foundation for world peace and prosperity. Any new world order should be based on the primacy of the rule of law without exception.

61. Turning to the various topics addressed in the Commission's report (A/47/10), he first of all drew attention, in connection with the establishment of an international criminal jurisdiction, to the complexity of all the issues which, in the view of the Commission's working group, would have to be resolved before any such body could be established, and which were set out in paragraph 414.

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(Mr. Nasier, Indonesia)

62. First, there were tremendous political and technical complexities involved in establishing international criminal jurisdiction. Although its establishment might be desirable from an ideal point of view, its feasibility was questionable. There were numerous insurmountable obstacles involved, including the surrender of a State's sovereignty, the relationship between international law and domestic laws, and the undermining of the principle of aut dedere aut judicare.

63. Secondly, the structure of the court should be flexible. It should be an ad hoc body, in the sense of a body created ex post facto, rather than a permanent mechanism. In that connection, questions arose as to its composition, which should be determined in each specific case, and the impartiality of the judges who would preside over the trials.

64. Thirdly, it would be necessary to determine what kind of jurisdiction the court could exercise: namely, should it be binding, optional, exclusive, concurrent with that of national courts or of a review character; should it be linked to the Code or not; who would be entitled to bring a complaint; and which State or States would have to give consent for the court to exercise jurisdiction in respect of the individual charged with the crime. On the first question, his delegation endorsed the proposal that consent should be the basis for the court's jurisdiction. Secondly, its competence should be optional and concurrent with that of national courts, which could not be divested of their jurisdiction held under their domestic law and general international law. Thirdly, the Code and the court's statute should constitute separate instruments; in other words, a State should be free to become a party to the Code without accepting the court's jurisdiction. Fourthly, only States parties to the court statute should have the right to institute proceedings. However, the court's jurisdiction ratione personae should be confined to individuals and cover only serious crimes against the peace and security of mankind, such as apartheid, aggression, State terrorism and serious cases of international drug trafficking.

65. Turning to the subject of State responsibility (chap. III), he said that, in his view, it should be dealt with in a much broader context, taking into account the interests of newly dependent States which came into existence before the traditional rules of international law were formulated. As the Special Rapporteur said, powerful or rich countries would be at an advantage in their exercise of reprisals against the wrongdoing States, as such action would lead to abuse of the weaker States. In fact, it was often the injured States which took countermeasures in breach of their international obligations. Furthermore, rather than being aimed at restitution or reparation, countermeasures generally tended to be punitive, while armed countermeasures were contrary to article 2, paragraphs 3 and 4, of the Charter. Accordingly, countermeasures had no place in the law on State responsibility. Other opportunities for redress, notably dispute settlement procedures, retortionary measures and diplomatic protests, were preferable.

66. His delegation was in general agreement with much of the substance of the Special Rapporteur's report on international liability for injurious consequences arising out of acts not prohibited by international law (chap. IV). It was self-evident that the progressive development of legal rules to address the mounting environmental issues was now paramount.

67. Finally, his delegation particularly welcomed the Commission's activities within the framework of the Decade of International Law (paras. 374 and 375). In that regard, it looked forward to the publication of a series of articles prepared by Commission members. It expressed its steadfast support for the mutually beneficial and constructive cooperation that existed between the Commission and the Asian-African Legal Consultative Committee, an activity which should be enhanced in order to reflect more fully the views and positions of the non-aligned countries in the formulation of new principles of international law.

68. Mr. STANCZYK (Poland) stated that his country, which had already approved the International Law Commission's mandate to consider issues relating to the establishment of international criminal jurisdiction, supported giving the renewed mandate sought by the Commission to enable it to undertake the project of creating the proposed jurisdiction.

69. The Commission's report indicated seven "basic propositions" (para. 395) reflecting the fundamental approach of the Working Group, which had thus laid the groundwork for further debates and offered a number of solutions. The time had certainly come to take the initiative. Although the idea of bringing those who had committed international crimes or offences to justice by a concerted international effort had been mooted for several decades, only now could States begin to give it their attention. The report of the Working Group and the present debate demonstrated awareness that a host of problems remained to be solved. It was to be hoped that the difficulties would be overcome.

70. His delegation shared the view of those advocating separation of the statute of the court and the Draft Code of Crimes against the Peace and Security of Mankind. Such a separation would facilitate the adherence to the statute by as many States as possible. However, that should not lower the legal status of the Code itself. It simply meant that a State could become party to the statute without automatically becoming party to the Code. A link of substance between the two instruments could not and should not be denied.

71. His delegation believed that the proposed international mechanism should have the following features, which it believed to be of particular importance: first, the jurisdiction of the court should be confined to private persons, and not to States; secondly, jurisdiction should be voluntary, or in other words, it should arise under an express declaration which was distinct from the adherence of the State; thirdly, the jurisdiction of courts of the States parties to the statute should not be ousted as a consequence of the

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establishment of the international court; they should have concurrent jurisdiction. Finally, the court should not be a standing, full-time body.

72. Explaining more specifically his delegation's view of the future international criminal court, he favoured a scheme that was likely to be accepted by the greatest number of States. He noted with satisfaction the near-unanimity on a number of issues. Those advocating more ambitious solutions would perhaps see their views gaining more support at a later stage. A successful functioning of the court, once established, could induce many States to reconsider their present stand. His delegation intended to respond positively to new needs and initiatives designed to develop the scheme. For the time being, however, it believed that the fastest possible progress should be made whenever the chance of agreement was forthcoming. In his view, it was worthwhile following the scheme outlined in the report of the Working Group, as it stood a chance of resulting in a workable system.

73. With regard to the structure and nature of the court, Poland believed that the new body should be established by means of a treaty agreed to by States parties. The possibility of using the United Nations Legal Counsel's Office as a registry deserved serious consideration. Judges should be chosen from a list in accordance with the method adopted for the Permanent Court of Arbitration. His delegation would not, however, advocate the establishment of close relations between a criminal court and the International Court of Justice, for example, by allowing a judge to sit on both courts at the same time.

74. His delegation saw the advantages of having persons accused of committing crimes tried by an international court. A more modest approach, however, also appeared to have its advantages. In particular, it would allow for a wider acceptance of the scheme by States, while offering a basis on which to build later. At the current stage, it was essential to win over as many States as possible to the idea of an international criminal court, while setting up a mechanism which could evolve without arousing the concern of any State. The conflict between compulsory and voluntary jurisdiction amounted, therefore, to a problem of the ripeness of the ideas involved.

75. With regard to the court's jurisdiction, his delegation accepted the Working Group's proposition that it should be limited to the crimes defined in specified international treaties in force. The court's jurisdiction should, of course, extend to the most serious offences. That applied, in particular, to drug trafficking offences. The treaty basis of the jurisdiction rationae materiae could be extended once the draft Code of Crimes against the Peace and Security of Mankind had entered into force.

76. Many previous speakers had, like the Working Group, stated that the jurisdiction rationae personae raised a considerable number of difficult problems, and his delegation concurred with that view. Nevertheless, it endorsed the solution provided for "the most straight-forward case(s)", as

(Mr. Stanczyk, Poland)

outlined in paragraphs 454 and 455 of the Working Group's report. Poland further agreed that the concept of "ceded jurisdiction" could be the basis of a useful conflict-resolution rule. In addition, careful consideration should be given to eliminating the requirement that both the territorial State and the State of nationality of the perpetrator should consent to the court's exercise of jurisdiction.

77. Guarantees of due process were of particular importance. Legal safeguards must be provided for in the court's statute. They must be no less exacting than the standards embodied in international human rights instruments. Furthermore, the court's rules of procedure would necessarily draw upon those embodied in national laws. Extremely close attention should be paid to the complex issues relating to prosecution, evidence, penalties and the implementation of sentences. Poland shared the concerns expressed by the United Kingdom on that subject and was similarly anxious to find the best solutions.

78. Turning to chapter III of the report, he said that his remarks would be limited to the legal regime of the measures that an injured State could take against a State having committed an internationally wrongful act. As previous speakers, as well as the Special Rapporteur, had stated, such measures had to do with the largely imperfect nature of the enforcement mechanisms currently available in international law. States should be entitled to adopt such measures provided that they were carefully defined. It was essential to exclude any possibility of abuse, and any further work on the subject must be carried out with a view to restricting, or indeed, eliminating, the negative phenomena associated with the use of countermeasures to date. Efforts must be made to establish a balanced regime.

79. From that point of view, even symbolic measures could be important. For that reason, the general rule expressed in draft article 11 should be formulated in negative terms, as follows: "An injured State [...] is not entitled not to comply with one or more of its obligations [...] unless the following conditions have been fulfilled". That would not change the meaning of the draft article, but it might change the attitude of States towards the regime in question. There should be at least five conditions for the legality of countermeasures: the existence of an internationally wrongful act; the submission by the injured State of a demand for cessation and reparation; the exhaustion of available dispute settlement procedures; the communication by the injured State of its intention to resort to countermeasures; and respect for the rule of proportionality. Poland reserved its opinion as to whether a requirement concerning the aim of countermeasures should be added to that list, although, in its view, a punitive aim should be expressly prohibited.

80. With regard to draft article 12, the Special Rapporteur had rightly held that the exhaustion of amicable settlement procedures should constitute a precondition for resort to countermeasures, and not a parallel obligation. The reasons for that were numerous and quite obvious. The Special Rapporteur had rightly provided, in paragraph 2 (a), that the injured State was not

(Mr. Stanczyk, Poland)

required to exhaust dispute settlement procedures where the State which had committed the internationally wrongful act did not cooperate. Accordingly, the condition stipulated in paragraph 1 (a) of the article was not an insurmountable obstacle to the adoption of countermeasures. He wondered whether the term "dispute settlement" might not be more appropriate than "amicable settlement", as that would bring the provision into line with the standard formula used in international instruments.

81. Paragraph 2 (b) appeared to be tainted by a misunderstanding of the concept of interim measures of protection. Such measures were usually ordered by a court or a tribunal pending the outcome of a case, in order to safeguard the rights of one or both parties. One of the main conditions of admissibility of such measures was the existence of a risk of "irreparable harm". Such measures were usually imposed on the wrongdoing State. By definition, interim measures were narrower and more technical than countermeasures which, pursuant to draft article 11, could take the form of non-compliance by an injured State with one or more of its obligations towards the wrongdoing State, subject to the restrictions in draft article 14. The injured State was usually incapable of "taking" an interim measure, in the proper sense of the term, if the wrongdoing State did not cooperate. Once that State did cooperate, however, its cooperation usually took the form of cessation and/or reparation, which ended the dispute. Hence, article 12, paragraph 2 (b), was conceptually inappropriate.

82. There was another reason to question the current wording of draft article 12: in practical terms, it transferred to the injured State the power to order interim measures, which properly belonged to an international court, and thus the power to implement a "provisional" judgement by that State in sua causa. That was not conducive to bringing the other State before a court in order to proceed with a third party settlement. It should be noted that paragraph 2 (b) was applicable only where the States concerned had accepted the third party settlement procedure and when they might at any time bring a case before an international body. Accordingly, such a body could, as a matter of priority, render a decision as to the admissibility of interim measures before any need arose for a State to take action unilaterally. If the wrongdoing State did not appear before the court, the body in question was not prevented from ordering interim measures. The practice of international tribunals had shown that, in that process, courts were guided by considerations relating to jurisdiction over the case and the parties. It might be that many States would unilaterally resort to interim measures which would subsequently be declared inadmissible by a tribunal or a court because of the frivolous invocation of its jurisdiction. That situation was not excluded by the current wording of paragraph 2 (b), however.

83. In sum, any unilateral decision to adopt interim measures was either covered by the more general wording of paragraph 2 (a), because it would simply involve a countermeasure, rather than an interim measure, or by the wrongdoing State's acceptance of a third party settlement, in which case the need for such measures hardly arose.

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(Mr. Stanczyk, Poland)

84. With regard to draft article 12, paragraph 3, many members of the Commission had already expressed the view that it required clarification and could not be accepted in its current form.

85. As to draft article 13, his delegation endorsed the formula used by the Special Rapporteur. The criterion of the effects of an internationally wrongful act provided a necessary limit to the concept of "gravity", which was liable to subjective interpretations. Thus, in its current wording, draft article 13 could serve as a general rule, without imposing on an injured State a detailed regulation to which it must adhere. Nevertheless, as it might be desirable to expand the conditions for resort to countermeasures by including a reference to their aim, namely, the cessation of wrongdoing and the initiation of a settlement procedure, much of the criticism directed at the lack of clarity in draft article 13 might become irrelevant. In any case, as his delegation had already stated, draft articles 11 to 13 should be combined in a single provision which would express, in negative terms, a general rule and the conditions for resort to countermeasures.

86. His delegation would favour some changes in article 14. It was not clear why paragraph 1, subparagraph (a) and subparagraph (b) (i) and (iii) could not become subparagraphs (a), (b) and (c) of paragraph 1. Furthermore, it was not clear whether paragraph 1, subparagraph (b) (ii) should be retained. Finally, paragraph 1, subparagraph (b) (iv) could become paragraph 2. The problem, however, did not stop there. There remained a problem of overlap between the aforementioned provisions in paragraph 1. Paragraph 1, subparagraph (b) (iii) could be made a residual rule, by rewording it to read "any other conduct contrary to a peremptory norm of general international law". As for paragraph 2, it was inappropriate to interpret the Charter. Moreover, a provision prohibiting any measure - not necessarily an extreme measure - of coercion jeopardizing the territorial integrity or political independence of a State could form a separate article.

87. On the topic of international liability for injurious consequences arising out of acts not prohibited by international law (chap. IV), he noted that, after years of work on the topic, there was growing awareness of the importance of studies of international law on the environment. For the past 14 years, the Commission had continued to devote its time and energy to the topic, and had made slow progress. The work had made slow progress. The work of its most recent session might have provided a new impetus and could result in significant acceleration. The decisions which the Commission had taken, on the basis of the report of its working group, concerning its future work were convincing evidence of its determination to make further progress.

88. His delegation approved of the Commission's decision to focus attention on the drafting of articles in respect of activities creating a risk of causing transboundary harm. It wondered, however, whether it would be possible to make a definite distinction between issues of prevention and remedial measures since the two were closely intertwined. The problem of the

(Mr. Stanczyk, Poland)

title of the topic could be left until a later stage. As to the nature of the instrument to be drafted, the Commission was right in deferring a decision until the final stage of its work. He reserved the position of his Government on that issue.

89. Chapter V of the report was concerned with other decisions and conclusions of the Commission on which he would like to comment. He welcomed the appointment of a new Special Rapporteur for the topic "The law of the non-navigational uses of international watercourses". He also welcomed the decision by the Commission not to pursue its consideration of the topic "Relations between States and international organizations". As to the new topics for possible inclusion in the agenda, the "ripeness" of an area, from the point of view of codification, should be the principal criterion. It was, however, important to bear in mind the current workload of the Commission, as well as the prospects for the successful discharge of the Commission's duties within the current term of office of its members. His delegation was therefore in favour of postponing a decision on any extension of the Commission's agenda for at least one year.

90. Mr. BERMAN (United Kingdom) complimented the Commission on the quality of its report (A/47/10) and commended the Secretariat for having issued it promptly. Without wishing to go into the working methods of the Commission, which were largely its own concern, his delegation approved the steps it had already taken to establish a coherent programme for the next quinquennium. In particular, it supported the Commission's decision to plan its activities for the duration of the term of office of the Commission's membership. Since it seemed that the Commission would soon complete its work on the law of the non-navigational uses of international watercourses, the main items to be considered during the forthcoming period would be the question of an international criminal court and State responsibility. It would be a worthwhile contribution to the Decade of International Law for those items to be brought to completion. The target date of 1996 was not unrealistic. However, if that target was to be met, priorities would have to be reviewed and a phasing, or even a postponement, of work on other topics might be required, each case being judged against the criterion of the likelihood of achieving concrete results within a reasonable space of time.

91. When major projects came to an end, as planned, it was important not to leave a vacuum. However, the new topics proposed for consideration must be manageable and worthwhile, and must meet a felt need. The procedure described in paragraphs 369 and 370 of the report was interesting in that respect. It should be noted, however, that neither the identification of new topics, nor their selection, was a matter for the Commission alone. Governments had a vital role to play and they must be ready to play it.

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(Mr. Berman, United Kingdom)

92. The chapter of the report on the topic of international liability for injurious consequences arising out of acts not prohibited by international law (chap. IV) was somewhat disappointing. The results of the Commission's work on the topic were uncertain. It was unfortunate that the Working Group established for that purpose had not taken a position on the basic issues which would have to be settled before an opinion could be formed on that work and on where it was leading.

93. His delegation welcomed the Commission's decision to concentrate on prevention and to deal at present only with activities having a risk of causing transboundary harm. That would help to confine the scope of the work to be done to a manageable size. It was, however, likely to have certain consequences. For example, if preventive obligations were to be established, there was no reason why the normal rules of State responsibility should not apply to breaches of those obligations, in much the same way as they applied to harm caused in breach of customary international law. Likewise, if a State failed to observe an obligation to consult or notify another State but no transboundary harm actually resulted, there was still an international wrong, but with somewhat different consequences which could be dealt with under the normal rules.

94. There was a doubtful dichotomy between activities involving risk and activities which caused harm: if an activity which caused harm was to give rise to preventive obligations on the part of the State of origin, the harm must be foreseeable. If the harm was foreseeable, then the activity was one involving risk. The likelihood or certainty of the harm should be one of the factors which triggered the preventive obligations, along with other factors such as the magnitude and reversibility of the harm. He saw no need, therefore, to distinguish between activities involving risk and those causing harm for the purposes of determining the applicable preventive regime. The Commission seemed to have arrived at the same conclusion.

95. Prevention could form part of a binding instrument. If so, it would be essential to define carefully the scope of application of the preventive obligations, as in the case of the Convention on Environmental Impact Assessment in a Transboundary Context of 1991. Recommendations or guidelines could conversely allow a less prescriptive approach, but would clearly bring back some uncertainty as to the legal consequences of their breach. There was a question as to whether it was necessary or appropriate to consider attaching legal liability to a State in respect of lawful acts. If transboundary harm occurred and could not be attributed to any breach on the part of the State of origin of its legal obligations, liability, if any, should rest with the operator, in accordance with the "polluter pays" principle. As his delegation had proposed the previous year, the topic should be renamed "International responsibility for transboundary harm". That much more straightforward title would meet an obvious need and would help to resolve the conceptual difficulties that had plagued the Commission over the years.

96. Mr. SZENASI (Hungary) said that the Hungarian Government was actively considering the draft articles on the law of the non-navigational uses of international watercourses and the draft Code of Crimes against the Peace and Security of Mankind. It attached special importance to the completion of work on the draft Code, in view of the situation in the former Yugoslavia and the fact that there was currently no international criminal jurisdiction to try war criminals.

97. His delegation had followed with great interest the work of the Working Group on the question of an international criminal jurisdiction (A/47/10, annex). It was of the view that the drafting of the Code of Crimes against the Peace and Security of Mankind (chap. II) should not necessarily be connected to the establishment of an international criminal jurisdiction, and that the statute of the court and the Code should constitute separate instruments. States should be able to become parties to both instruments or to only one of them and access to the court should not be restricted. Moreover, the court should not be a full-time body and should have no compulsory jurisdiction. Its jurisdiction should not exclude the concurrent jurisdiction of States. The court should be given a truly universal character. Irrespective of the seriousness of the crimes committed, the Code should refrain from imposing the death penalty. Furthermore, defendants brought before the court should enjoy guarantees of penal procedures at least equal to those existing under their national legislation. While it welcomed the progress made by the Commission in its consideration of the item, his delegation believed that States should be given a further opportunity to study its work carefully and to submit more detailed comments on it at the following session.

98. On the topic of "State responsibility" (chap. III), his delegation welcomed the progress that had been achieved and hoped that the Commission would be able to conclude its work by the end of the current term of office of its members by submitting to the international community a comprehensive and coherent set of articles covering all aspects of the topic.

99. On the specific problem of countermeasures, his delegation agreed that the regime under consideration should reduce to a minimum the scope of permissible unilateral initiatives. The margin for permissive countermeasures had been narrowed by the emergence of new opportunities for more effective use of existing mechanisms and procedures for the peaceful settlement of disputes and by the setting up of more suitable methods tailored to the special needs of certain groups of States.

100. The Committee should, however, adopt a realistic approach. Countermeasures were likely to subsist for a long time in inter-State relations. The main objective of any regime should therefore be to prevent any possible abuse, by strengthening safeguards. It was important to ensure that unilateral initiatives were kept within the limits of peremptory norms and other principles of contemporary international law, and to promote respect for law by compelling States to comply with their obligations and to submit

their disputes to impartial third party settlement procedures. In that connection, there was a danger that the requirement regarding the exhaustion of all available dispute settlement procedures favoured powerful States to the detriment of weaker States.

101. On the topic of "International liability for injurious consequences arising out of acts not prohibited by international law" (chap. IV), his delegation attached particular importance to the many vital problems which it raised from the standpoint of the emerging international law on the protection of the environment. It had followed closely the work of the Commission on the topic and noted with regret that, because of a lack of consensus on many basic questions, the Commission had been unable to achieve any real progress in that area.

102. As for the other decisions and conclusions of the Commission (chap. V), his delegation noted with satisfaction that the Commission had been able to reduce the volume of its report significantly while preserving its highly professional character. It thought that some caution should be exercised in the selection of new topics for future consideration.

103. His delegation attached great importance to the International Law Seminar (paras. 383 to 391) in which a young Hungarian lawyer had participated in 1992.

104. Mr. ZMIYEVSKY (Russian Federation) said that the topic of State responsibility (A/47/10, chap. III) was one of the most complex in international law and that, in considering it, the Commission was playing a pioneering role. The fact that it was now approaching the final stages of the drafting of an instrument was due to the growing trend towards democracy which encouraged States to base their relations on international law.

105. The concept of countermeasures was central to consideration of the topic. The definition of that concept should not give it a punitive character, since that would be contrary to the peremptory norms of international law and would restore the vicious circle of "power politics" and the currently outmoded distinction between powerful and weak States. A thoughtful approach must therefore be adopted which would take account of the realities of the post-cold-war period and give due consideration to the interests of all parties through reliance on the new possibilities offered by the principles and norms of international law.

106. The Russian Federation believed that emphasis should be placed on a more effective use of the mechanisms and procedures for the peaceful settlement of disputes. More frequent resort to those mechanisms and procedures at the universal and regional levels would considerably reduce the scope of the reprisals admissible under contemporary international law. The increasingly widespread observance of the principle of the inadmissibility of the threat or use of force in international relations served to limit recourse to punitive

(Mr. Zmiyevsky, Russian Federation)

measures. The main problem with the concept of "response" (the expression which the Russian Federation preferred to "countermeasures") was the absence of a mechanism for the impartial and rapid determination of the existence of an internationally wrongful act. To grant an exclusive right to the injured State to determine the existence of a wrongful act would open the door to unilateral acts, many of which would be based on subjective decisions, and to abuses with serious consequences for the peace and happiness of peoples.

107. At a time when processes of disintegration were impeding the harmonious development of the international community, it was important to refrain from granting a legally superior standing to reprisals which were unilaterally decided upon and to establish instead a common legal standard which would serve as a framework for the collective action undertaken by the community of nations on the basis of the United Nations Charter and other universally recognized instruments with a view to preventing and eliminating the consequences of internationally wrongful acts.

The meeting rose at 6.20 p.m.

UNITED NATIONS
General Assembly
FORTY-SEVENTH SESSION
Official Records

SIXTH COMMITTEE
29th meeting
held on
Thursday, 5 November 1992
at 3 p.m.
New York

SUMMARY RECORD OF THE 29th MEETING

Chairman:	Mr. ZARIF	(Islamic Republic of Iran)
later:	Mr. TOMKA (Vice-Chairman)	(Czechoslovakia)

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The meeting was called to order at 3.20 p.m.

AGENDA ITEM 129: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FOURTH SESSION (*continued*) (A/47/10, A/47/95, A/47/441-S/24559)

1. Mr. SCHARIOTH (Germany) agreed with the International Law Commission's view that the multitude of problems raised by the topic of international liability for injurious consequences arising out of acts not prohibited by international law, and the close linkage between it and, *inter alia*, the question of State responsibility, now required the establishment of clear-cut priorities. That was why his delegation welcomed the decision taken by the Commission to concentrate first on the issue of preventing activities which had the potential to cause transboundary harm. International law in the field of environmental protection had made great strides during the past decade. Many treaties on international cooperation in that field contained provisions on the prevention of transboundary effects of certain uses of the environment. The Rio Declaration on Environment and Development, for example, spelt out a number of principles aimed at preventing or minimizing possible harmful effects on the environment of other States.

2. Thus the Commission was entirely right in giving priority to that aspect of the topic. His delegation shared the Commission's view that decisions on the other issues explored by the Special Rapporteur should be taken only after the problem of prevention of transboundary harm had been satisfactorily resolved.

3. Mr. FISSENKO (Belarus), also referring to the question of international liability for injurious consequences arising out of acts not prohibited by international law, said that the recent Conference of Rio de Janeiro had demonstrated the world-wide determination to come to grips with the problem of environmental degradation. The International Law Commission was called upon to play an important role in that field.

4. The Chernobyl catastrophe had been a tragedy for the Republic of Belarus, whose territory had been declared a disaster area. The ceaseless efforts made by his Government to attenuate the consequences of the accident were proving inadequate; international cooperation alone would make it possible to achieve tangible results. It was to be hoped that such cooperation would continue and expand.

5. The Commission's work on the topic had proceeded in a satisfactory manner, although more fruitful results might have been expected. The first series of articles already referred to the Drafting Committee represented a good starting-point. The second series of articles proposed by the Special Rapporteur was of a more exploratory nature, but it touched upon the principles of non-discrimination and prevention which would form the essential elements of a future instrument on the topic.

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6. His delegation endorsed the recommendation in paragraph 349 of the Commission's report concerning the next report of the Special Rapporteur. It agreed that the Special Rapporteur should examine further the issues of prevention only in respect of activities having a risk of causing transboundary harm, and should propose a revised set of draft articles to that effect. As to the nature of the articles or of the instrument to be drafted, his delegation associated itself with the view that no decision should be taken until the Commission had completed its work. In drafting the articles, the Commission should take full account of the basic provisions of the Stockholm and Rio Declarations. Its task was to give legal form to the results of the essentially political deliberations of the Stockholm and Rio Conferences.

7. With regard to the programme and working methods of the Commission, his delegation endorsed the tentative schedule set out in paragraph 366 of the report. In particular, it felt that the second reading of the draft articles on the law of the non-navigational uses of international watercourses should be completed as early as possible, followed by the second reading of the draft articles of the Code of Crimes against the Peace and Security of Mankind and the first reading of the draft articles on State responsibility. It also endorsed the Commission's intention to make substantial progress on the topic "International liability for injurious consequences arising out of acts not prohibited by international law" and to undertake work on one or more new topics.

8. His delegation had taken note with interest of the steps to be taken with a view to strengthening the Commission's contribution to the Decade of International Law, including, in particular, the preparation of a series of articles aimed at presenting an overview of the main problems of international law on the eve of the twenty-first century. Greater use should be made of the extensive knowledge and experience of the Commission's members by inviting them to participate in the work of national associations of international law.

9. His delegation unreservedly supported the Commission's efforts to rationalize and streamline the work of its sessions. It also welcomed the Commission's cooperation with other international and regional legal bodies and hoped that such cooperation would be extended to the countries of Eastern Europe, of which the Republic of Belarus was one. Lastly, he called for greater support of the International Law Seminar, which should be attended by the largest possible number of young lawyers from all countries.

10. Mr. Tomka, Vice-Chairman, took the Chair.

11. Mrs. GOLAN (Israel) recalled the view previously stated by her delegation that, because of its complexity and the lack of sufficiently precise rules under current substantive law, the topic of international liability for injurious consequences arising out of acts not prohibited by international law should be approached cautiously. Her delegation therefore fully agreed with

(Mrs. Golan, Israel)

the decision of the International Law Commission to deal with the topic on a stage-by-stage basis and to defer until later the decision as to the nature of the final instrument or instruments to be drafted.

12. With regard to the attribution of responsibility, her delegation agreed with the distinction drawn by the Special Rapporteur between the prevention of transboundary harm and compensation for such harm, as well as with the view that those two questions should be dealt with separately since the proposed articles on prevention were intended only as recommendations or guidelines to States and since the question of compensation did not arise so long as no harm had been caused.

13. Her delegation saw no need to distinguish between activities involving risk and those causing harm for the purpose of determining the applicable preventive measures at the national level, namely, unilateral preventive measures; however, different preventive measures, or different degrees of measures and procedures, should be applied in relations with potentially affected States, depending on the activity involved. Furthermore, in the case of activities involving risk, the obligation to take preventive measures should not entail obligatory compensation or reparation in the event of the occurrence of harm.

14. The principles embodied in articles 1, 2 and 3 of the nine draft articles proposed by the Special Rapporteur should be retained. The consultations provided for in draft articles 6 and 7 must not result in conferring a right of veto on other States which might be concerned or pretend to be concerned. The State of origin should retain freedom of choice as to whom to consult and have the final decision with regard to the proposed activity.

15. Further consideration should also be given to the usefulness of the procedures for settlement of disputes contained in draft article 8. As to draft article 9, the enumeration of the factors to be taken into consideration during the consultations to reconcile the interests of the States concerned should have only indicative or recommendatory force: the States concerned should be free to use other criteria relevant to the activity in question. Lastly, the final text to be adopted on the topic should not be a binding instrument.

16. Mr. HAYES (Ireland), referring to international liability for injurious consequences arising out of acts not prohibited by international law, said that it was disappointing that old arguments had been rehearsed once more in the Commission, not only on detail but also on fundamentals, and even on matters relating to the conceptual basis of the topic. However, the schematic outline adopted by the Commission had already established as the guiding principles for the topic the aphorism sic utere tuo ut alienum non laedas and the idea that the innocent victim should not be left to bear the burden of his loss. It followed from those principles that the topic covered lawful activities and included a requirement to take measures to prevent damage.

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Similarly, the principle protecting the innocent victim necessarily implied compensation for loss that was not due to fault.

17. It was therefore surprising that some members of the Commission should talk (A/47/10, para. 288) about the absence of a clear-cut division between the topic and State responsibility and should refer to "a legal regime where it would be lawful to inflict harm on someone provided that compensation was paid". Rejection of the idea of a regime of strict liability, an idea which some members resisted (A/47/10, para. 289), would constitute rejection also of the principle protecting the innocent victim. Strict liability meant liability that arose other than from fault. It did not imply full compensation for harm regardless of the circumstances or exclude the factors mentioned in paragraph 289; on the contrary, the compensation measures must emerge from negotiations between the parties in which that factor and perhaps others would be taken into consideration.

18. Nor was it reassuring that there should still be a full-blown debate at the present stage on the title of the topic, the nature of the instrument to be prepared, and the interrelationship between preventive measures and reparation and the force to be given to each, as well as on the question of whether the topic should be limited to environmental matters, as emerged from paragraph 287 of the Commission's report. That tendency to narrow the scope of the topic was reflected in the revised definitions of "risk" and "harm", which were too restrictive.

19. The application of the principle sic utere internationally represented a balance between the sovereign rights of States: on the one hand, the right of any State to engage in lawful activities in its territory without being answerable to another State; and on the other hand, the right of any State to enjoy the benefit of its amenities without them being diminished by activities, including lawful activities, of another State. It was therefore illogical to envisage (A/47/10, para. 290) the liability of the operator rather than of the State. It also seemed inappropriate to incorporate in the topic an element of private international law which might also give rise to issues of State immunity by departing from inter-State relations.

20. His delegation was pleased that the Commission had established a working group to consider the general issues relating to the scope of the topic, the approach to be taken, and the possible direction of future work, but it could not understand why the Commission had concluded that it would be premature to take a decision on the scope of the topic. It wondered whether, in the case of a topic involving considerable developmental work as well as codification, it was possible to draft articles without knowing the final form which they would take. However, it welcomed the conclusion that the topic embraced both prevention and remedial measures. It was uncertain about the decision to work in stages and about the choice of a very limited aspect of the topic for consideration as the first stage, but it hoped that such a procedure would at least enable the Commission to move on from inconclusive general debates and make some progress.

(Mr. Hayes, Ireland)

21. Lastly, the Irish delegation urged the Commission to concentrate on identification of the principles governing the topic and to take into account the work being done in more political forums on what was an important topic. However, while the Commission should take such work into account, it should not merely give it appropriate legal form, as suggested in paragraph 287 of the report.

22. Mr. POSTICA (Romania) said that State responsibility was a fundamental element of international law and that the draft articles, which had been written in a form which would enable them to be turned into a convention on State responsibility for internationally wrongful acts, were of undeniable topicality. In fact, in an international society lacking a universal legislature and judiciary in which, by virtue of its sovereignty, a State took its decisions in freedom and came into conflict with an equal freedom on the part of other States, that important element of international law was a necessary mechanism for regulating relations between States. In international terms, the principle of the responsibility of States was as old as the principle of their equality and could therefore be described as its corollary. States were equal, but they were so in rights as well as in duties.

23. However, despite recognition of the principle, the law of international responsibility remained basically customary law and very controversial and confused. That was why its codification was difficult. Furthermore, the Commission was aware of the difficulties raised by the topic and had rightly noted that while it was one thing to define a rule and the content of the obligations it imposed, it was something quite else to determine whether that obligation had been violated and what the consequences thereof should be.

24. In that context the legal regime of countermeasures was one of the most difficult subjects of the whole topic, as could be seen from the contradictions which had emerged during its discussion. The Special Rapporteur had rightly opted for the notion of "countermeasures" rather than "reprisals" or "boycott", which smacked more of the idea of punishment. Nevertheless, that choice prompted questions as to the soundness of the decision to deal with countermeasures separately in the general scheme of the draft articles.

25. Given the divergence of views in the Commission itself and the often contradictory suggestions made during the consideration of the topic, his delegation hoped that the Special Rapporteur and the members of the Commission would reflect in greater depth about the legal, the political, and especially the practical consequences of the approach proposed so far in the text of the draft articles.

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(Mr. Postica, Romania)

26. Aside from the wording of the articles on countermeasures, it should be noted that they were subject to certain specific conditions which should be defined, even if the list could never be exhaustive or perfect. In that respect, his delegation associated itself with the comments made by other delegations at the current session regarding the essential conditions that would justify resort to countermeasures. First, draft article 11 rightly envisaged that lawful resort to countermeasures was conditional upon the actual existence of an internationally wrongful act and the prior submission by the injured State of a "demand" of cessation/reparation. Second, the principle of exhaustion of settlement procedures set forth in draft article 12 was a well-established principle of general international law. Third, respect for well-defined prior conditions must be guaranteed by appropriate means in order to eliminate all subjectivity in determining the existence and seriousness of the wrongful act, while at the same time strengthening the means for the peaceful settlement of disputes. A balance needed to be found between the need to monitor resort to countermeasures and the need to avoid favouring the offending State.

27. His delegation supported the approach taken by the Commission with regard to its programme, procedures and methods of work and, like other delegations, welcomed the results of the work of its Drafting Committee. The Committee, in the resolution on the report of the Commission on the work of its forty-fourth session, should give the Commission a precise mandate for its forty-fifth session. To that end, his delegation was prepared to take part in informal consultations in order to reach a consensus.

28. Mrs. FLORES (Uruguay) said that while she supported the decision to consider the question of prevention before taking up the question of reparation in the context of international liability for injurious consequences arising out of acts not prohibited by international law, she did not support the idea of giving the provisions on prevention the form of recommendations. The reasons put forward in paragraphs 283 and 284 of the Commission's report (A/47/10) were not sufficiently compelling; there was nothing to prevent the inclusion of primary rules in the draft articles, and other matters such as immunity of States from jurisdiction in courts of other States could be resolved. It could be envisaged that the State of origin of transboundary harm would be unable to invoke immunity of jurisdiction, and equality of access to the courts could be established.

29. As to the nature of the future instrument, her delegation continued to advocate the drafting of a framework convention with binding force, without prejudice to the bilateral treaties which might be negotiated. As noted in the Commission's report, certain instruments, for example the Rio and Stockholm Declarations, set forth principles relating to the rights and obligations of States concerning the use of their territory, and areas or objects under their jurisdiction or control. Those principles, in particular principles 2, 6, 7, 9, 11, 13, 15, 16, 17, 18, 19, 25, 26 and 27 of the Rio Declaration, which reproduced various provisions of the Stockholm Declaration,

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(Mrs. Flores, Uruguay)

could be incorporated in the instrument to be drafted. It would be necessary to take into account principle 13, which was applicable to transboundary harm (to persons, property and the environment), under which States were invited to develop national law regarding compensation for damage caused. In the view of her delegation, that should be one of the objectives of the draft articles.

30. With regard to the new draft articles submitted by the Special Rapporteur, her delegation, on the question of assessment of harm, supported the requirement of prior authorization by the State under whose jurisdiction or control the activities envisaged were to be carried out, and believed that such authorization should be a mandatory requirement. However, there was no reference to activities which had already been undertaken and were liable to cause transboundary harm. Similarly, a provision should be included to the effect that before authorizing activities which were liable to cause harm, the State should conclude an agreement with the States which might be affected. It was becoming increasingly necessary to have objective rules based on technical criteria that would offer guarantees with regard to the conduct of such activities.

31. As to article 2, her delegation believed that the first obligation of a State of origin which, following an assessment, determined that an activity would certainly or probably cause significant transboundary harm was to not authorize it. It should seek a way of avoiding the harm or reducing it to a minimum and, in the latter case, should conclude an agreement with the State or States which might be affected before authorizing the activity.

32. Article 4 should be closely linked with the procedure for the peaceful settlement of disputes. The establishment of such a procedure was esential so as to make it possible to settle disputes within reasonable periods of time. Her delegation did not support the provisions of article 5, because if the hypothesis envisaged occurred, the State under whose control the activity concerned would be carried out should not authorize it, and a negotiating procedure should be initiated with the State liable to be affected. The right accorded to the affected State in that provision was only one of the options available to the State under whose control the activity concerned would be carried out. Lastly, article 9 should indicate that the list of factors was not exhaustive. Moreover, those provisions should be formulated so as to take into account the special situation of developing countries.

33. Mr. SALEEM (India) said that the International Law Commission had not made much progress on the subject of international liability for various reasons: initially, it had had to define the parameters of the subject in order to distinguish it from the subject of international watercourses, on the one hand, and State responsibility on the other. In the field of the environment, developments were fast and sweeping and needed to be brought into focus. Liability in that area was dependent upon agreement on the basic principles governing various activities. For example, liability concerning air pollution could only be considered after agreement had been reached on the

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(Mr. Saleem, India)

general principles governing or limiting air pollution and standards for air quality had been fixed. The general principles on the basis of which liability was being considered in the Commission were not yet settled, as there were differing views. Moreover, the Commission had not been able to consider the subject because other items on its agenda had had priority.

34. Although the subject was very important, careful analysis of the texts was required before they were finalized. A conceptual framework would have to be settled before specific draft articles could be considered. That framework should deal not merely with the problem of liability but also with conditions for its operation. It was also important to transfer resources, particularly financial resources, to financially weaker and developing countries in order to enable them to organize their economies and their practice in an environmentally friendly manner, and so as to provide programmes of international assistance to transfer know-how and financial resources in case of emergencies and help States be prepared for dealing with natural or environmental crises.

35. The principle that a State should bear full responsibility for any activity that might take place within its boundaries was too simple and general to take adequately into consideration the many different situations which could affect activities within the territory of a State. The responsibility of financially independent multinational corporations whose governing bodies were drawn from different countries or were internationally constituted would require to be handled on its own, and not under the general principles of responsibility.

36. The special needs and limitations of financially weaker and developing countries required in-depth study, as a separate matter. Their dependence on foreign sources of technology, funding and basic necessities was a determining factor to be taken into account before fixation of liability upon such States for activities conducted within their borders.

37. Certain principles of procedure discussed by the Commission, such as the principle of notification, consultation, negotiation, and settlement of disputes concerning an environmentally "dangerous" activity, were not convincingly treated. Those principles deserved to be discarded where they entered into conflict with other equally important concepts of international law, namely, the sovereign equality of States and the sovereignty of States over their people, territory and natural resources. Most of those procedural principles, instead of facilitating cooperation, could easily engage States in disputes, particularly when such States did not have an agreed understanding on measures to be employed, safety standards to be monitored and steps to be taken in the case of activities which entailed bearing risk or were inherently dangerous.

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(Mr. Saleem, India)

38. The question could also be asked whether a common code on liability would be desirable, or indeed necessary. For example, it had been considered preferable to deal with hazardous nuclear activities within the framework of a convention on liability for damage caused by nuclear activities. Similarly, it had been considered that activities concerning environmental pollution, and more specifically the ozone layer, were better dealt with in a separate convention.

39. The topic of liability for injurious consequences arising out of acts not prohibited by international law should be carefully delimited in scope. The topic should avoid dealing with specialized regimes, such as that of nuclear liability, which were negotiated separately by States, or with activities which were otherwise regulated by existing norms and conventions. Moreover, the Commission should not consider certain issues which were currently being dealt with by States in the field of biodiversity and climate change.

40. In considering the topic, the Commission should carefully proceed on the basis of known concepts of tort law, where a close nexus between the source and the effect provided the basis for liability. However, depending on the needs of the international community and the consensus available, exceptions could be made to the standard theory of liability by indicating expressly the circumstances and reasons for such deviations. In that regard, the role of strict or absolute liability should be investigated.

41. The Commission should also provide for liability of the operator for the conduct of his activities when they resulted in loss or damage, subject to the defences available to him. Innocent victims must be given due and prompt compensation, subject to the considerations of public policy in promoting certain activities for which a ceiling should be fixed on pecuniary compensation.

42. Given the availability of insurance systems, it might also be agreed to establish special funds, either financed by operators or established by States in accordance with their national laws. Where the operator or his insurance could not compensate in a reasonable manner for the damage caused, additional compensation could be provided from other funds established by contributions from the operator or the State.

43. In addition, while the State had some important functions to perform through its legislative, executive and judicial bodies in setting standards in that field, monitoring their implementation and ensuring their observance, it should not be automatically held liable for damage which might occur as a result of activities undertaken within its territory. Such liability should basically lie with the operator. State liability should only be envisaged by way of exception, unless the State itself was the operator. The Commission was quite correct in its decision to consider first the issues concerning prevention of damage. As part of that effort, it could consider the issue of liability for damage resulting even after necessary preventive steps had been taken or in spite of such steps.

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44. In conclusion, his delegation had an open mind as to the form the outcome of the Commission's work should take, a draft convention or a body of principles or guidelines.

45. Mr. POLITI (Italy) said that the adoption of a definitive text of the draft articles on State responsibility would represent an essential step forward in the codification of international law in that field and a major contribution to the Decade of International Law.

46. His delegation had reviewed with special interest the chapter of the Commission's report on the topic and was pleased to note that the forty-fourth session had been particularly fruitful in that regard. The progress of the work had been so substantial that there were good prospects for the first reading of the draft articles to be completed by 1996. In that connection, his delegation did not believe that it was necessary to include provisions on the settlement of disputes in Part Three of the draft in order to complete the work. Since there was no inherent connection between that question and the topic of State responsibility, it could be treated separately in relation to the different systems of primary rules accepted by States.

47. With more specific reference to the question of the regime of countermeasures, his delegation shared the view that, since law enforcement mechanisms were far from perfect in international society, injured States should retain the faculty of taking direct and independent action to restore compliance with international law. That faculty should, however, be exercised within the carefully defined limits of a regime aimed at preventing every possible abuse. His delegation also agreed with the approach suggested by the Special Rapporteur concerning various important elements of the draft being prepared: the reduction and possible elimination of the punitive component of countermeasures, the need for a precise definition of the notion of countermeasures in relation to the concepts of reprisals, sanctions and measures of retortion, and the opportunity to deal with the issue of countermeasures as a reaction to internationally wrongful acts falling within the category of delict before moving to the question of the consequences of so-called international crimes.

48. There were many merits in the formulation of draft articles 11 to 14 and 5 bis as proposed by the Special Rapporteur. A proper balance was ensured between the need to provide legal rules that were workable and effective and the need to lay down strict conditions and rules under which the use of countermeasures could be regarded as lawful. That did not mean, of course, that a totally satisfactory solution had been found to all the complex issues raised by the proposed scheme. On the other hand, it should be possible to find a satisfactory solution to even the most controversial questions considered by the Commission, such as the conditions for the use of countermeasures, proportionality, prohibited countermeasures and the violation of erga omnes obligations.

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(Mr. Politi, Italy)

49. The topic of international liability for injurious consequences arising out of acts not prohibited by international law not only involved the consideration of very difficult theoretical problems, but was also characterized by a practice which was anything but uniform. At the same time, the Italian delegation noted with satisfaction the Commission's work on the item, and expressed appreciation to the Special Rapporteur for his conduct of the work.

50. With regard to the future programme of work of the Commission, the decisions taken had the merit of having been based on a consensus which could be reflected in tangible results in the near future. At the same time, the Italian delegation wished to make a few observations on some of the points addressed in the report of the Commission and the eighth report of the Special Rapporteur.

51. First of all, the draft under discussion should include rules on the prevention of transboundary harm. Since one of the main objectives of the draft was to provide a legal framework for the regulation of the various sectors of activity involved, it would be difficult to justify the absence of rules concerning preventive measures, whether unilateral or procedural, to the definition of which States had devoted so many efforts in the field of environmental protection. Of course, that raised a number of theoretical difficulties, relating essentially to the overlap between that issue and the issue of State responsibility. There were various ways of overcoming those difficulties, for example, through the development of provisions of a recommendatory nature, as suggested by the Special Rapporteur. Nevertheless, there was a need to indicate, concisely but clearly, what the State's fundamental obligations were with regard to the control of hazardous activities carried out within its jurisdiction, as well as notification, information and consultation with affected States or potentially affected States.

52. As to the distinction between activities involving a risk of transboundary harm and activities with harmful effects, which had led the Commission to concentrate its efforts on the question of the prevention of activities involving risk, the Italian delegation shared the doubts expressed by other delegations concerning the real need to treat the said activities separately. On the one hand, the obligation of prevention did not differ greatly in the two situations, while on the other hand, the definition of such an obligation in a single set of rules would simplify the draft and would eventually facilitate the application of the future regime of international liability.

53. With regard to compensation, the obligation to compensate which was incumbent upon the State of origin should be of a residual nature. The regime under elaboration should take due account of the various aspects of the relationships between the civil liability of the operator and the international liability of the State. A well-designed and flexible system

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could establish the right balance in that area between the need to compensate innocent victims and the need for the costs to be shared equitably between the operator, insurance companies, private and public funds and the State of origin of the activity concerned.

54. Lastly, the nature of the future instrument on international liability should be decided on the basis of the same flexible approach. While such a decision could certainly be deferred to a later stage, his delegation wondered whether it might not be preferable for the Commission to take a decision before the completion of its work, in particular with regard to issues such as prevention, on which a consensus could more easily be reached once the nature of the articles to be drafted had been defined.

55. Mrs. VALDES (Cuba) said that the section of the report of the International Law Commission which dealt with the establishment of an international criminal jurisdiction had raised many doubts among the members of her delegation. In the first place, it was to be feared that the establishment of such a court might encroach on the national jurisdiction of States, thus impairing their sovereignty. Secondly, the members of the Working Group did not appear to have reached agreement on the structure of such a mechanism: some felt that the court should be a standing body, comparable to the International Court of Justice, or should even be a chamber of the Court, while others thought that it should take the form of a special mechanism, pre-existing but not permanent, which would be convened only when there were reasons to believe that a norm of international law had been violated. There was a similar divergence of views with regard to the composition and jurisdiction of the court. Some thought that it should have jurisdiction only over crimes against international peace and security, such as those defined in the draft Code of Crimes; others believed that its jurisdiction should extend to other types of offences. Nor had a consensus been reached on the question of the type of instrument which would establish such a court: should it be a treaty? Should the court's jurisdiction be binding or optional?

56. Some delegations had proposed that the court should be linked in some fashion to the Security Council. In that connection, a strict reading of the Charter of the United Nations did not elicit any mention of that possibility as one of the responsibilities attributed to the Security Council, whose competence was clear and did not lend itself to sophistic interpretations.

57. For all those reasons, Member States should have time to study the question carefully before giving the Commission a mandate to proceed with its work on the subject.

58. With regard to chapter III of the report and, in particular, the countermeasures which an injured State could take against a State having committed an internationally wrongful act, the Cuban delegation shared the

(Mrs. Valdes, Cuba)

view expressed in paragraph 124 of the report, namely, that powerful or rich countries could easily enjoy an advantage over weak or poor countries in the exercise of the means of redress in the form of reprisals or countermeasures.

59. Furthermore, the fact that countermeasures had not been codified in the past had never prevented powerful countries from resorting to their use against weaker countries. Despite the stipulation that the regime of countermeasures would exclude the use of military force, it contained the seeds of aggression because, as Cuba had repeatedly stated over the years, political coercion and economic pressure were as much forms of aggression as was military force.

60. Moreover, the uncertainty surrounding some aspects of the topic should be an inducement to even greater caution. Indeed, who would determine in each instance, and on the basis of what criteria, whether an act of aggression had occurred which justified the use of countermeasures? Who would measure the gravity of the harm caused, so as to ensure that the reprisals carried out by the country which deemed itself to have been injured were not disproportionate? Who could show that the injured country really had exhausted all methods of peaceful settlement before resorting to such measures? If all those questions were to be answered by the country which claimed to have been injured, neither the impartiality nor the validity of the decisions to be taken could be absolutely guaranteed. Accordingly, the Cuban delegation questioned whether it would be desirable for countermeasures to be embodied in international law.

61. Lastly, the Commission had for a long time assisted developing countries by organizing seminars for them in conjunction with its work. It would be desirable to find a means of increasing the Commission's efforts in that area without an excessive commitment of funds.

62. Mr. KAZI (Pakistan) said he was pleased with the level of debate and with the progress made in the International Law Commission on the question of State responsibility. He hoped that the Commission would complete the first reading of the draft articles before the end of the current term of office of its members. It was true that the instrumental consequences of an internationally wrongful act, or countermeasures dealt with in the third and fourth reports of the Special Rapporteur, represented one of the most difficult subjects within the whole topic. In the absence of an institutionalized system which could be set in motion against a State that had committed an internationally wrongful act, the injured State could only rely on its own actions to stop the wrongful act and initiate remedial measures. Opinions within the Commission were divided as to whether provisions on countermeasures should be included in the draft. It was difficult to define a countermeasures regime, not least because of the disparities in the size, power and level of development of States. As the Special Rapporteur had pointed out, powerful or rich countries enjoyed an advantage over the weak or poor in the exercise of reprisals or countermeasures. In defining the legal regime of countermeasures, then,

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(Mr. Kazi, Pakistan)

particular attention should be given to the situation of developing, poor and weak countries, in order to prevent the regime from becoming a tool of power politics. The subject needed further consideration by Member States and the Commission.

63. With regard to the draft Code of Crimes against the Peace and Security of Mankind, he noted that differences existed within the Commission on the question of establishing an international criminal court or international trial mechanism and that many complex issues remained unresolved, particularly with regard to the jurisdiction of such a court. Indeed, the Chairman of the Commission had himself recognized that fact when introducing the Commission's report and had stated that some members had questioned the feasibility of establishing an international criminal jurisdiction, an idea which involved the surrender of sovereignty by States, raised constitutional difficulties for some States and entailed the risk of undermining the validity of the well-established principle of aut dedere aut judicare.

64. Members of the Commission were also divided on other questions, such as who might be entitled to bring a complaint before the court, which State or States would have to give consent for the court to have jurisdiction in respect of an individual charged with a crime, which law would be applicable, what relationship would exist between the court and the Security Council, and how compensation procedures should be defined.

65. It was a basic principle of criminal law that offences must be defined clearly and punishment provided for in advance, since criminal law could not be applied retroactively. In order to investigate a crime and try the alleged perpetrators, a code of criminal procedure was necessary which provided for: registration of crimes, arrest of the accused, interrogation of the accused or suspects, hearing of witnesses, gathering of evidence, hearing of expert witnesses if necessary, confession of the accused, if any, and the power of the investigating officers to detain the accused during the investigation. The powers and functions of the prosecutor, who was required to assist the court impartially, must also be properly defined. Provision must also be made for trial procedure, and States would have to amend their existing laws for that purpose. In addition, the law of evidence would have to be codified.

66. Furthermore, the rights of the defence must be safeguarded. The accused might experience difficulties in defending himself if he was tried far from his own country and might have trouble engaging a competent lawyer, especially if he was without means. In some cases an interpreter might also be necessary. The venue of the trial was an important factor; the trial might be held either in the country where the offence had been committed or at the headquarters of the international criminal court.

67. Finally, the principle of the right to appeal must be respected. An appellate authority should therefore be set up to hear appeals against the judgements of any proposed court, whether of acquittal or conviction. Provision should also be made for a time-limit for the filing of appeals.

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(Mr. Kazi, Pakistan)

68. In preparing a draft statute for an international criminal court, the Commission must examine all the questions he had just raised. States should be given an opportunity to study in detail all the aspects of the many complex issues raised in the Commission's most recent report. The relevant ministries needed to study and analyse the implications of the establishment of an international criminal jurisdiction, and it was therefore prudent to seek the views of States before proceeding further on the question.

69. Mr. SIDI ABED (Algeria) was pleased that paragraph 114 of the report reaffirmed the original link between the two aspects of State responsibility, namely the responsibility that derived from internationally wrongful acts and the responsibility that derived from acts not prohibited by international law.

70. His delegation believed that the question of countermeasures, the instrumental consequences of an internationally wrongful act, had its origins in the practice of certain States, which also happened to be the most powerful ones. Only if the most careful safeguards were included could countermeasures aspire to universal acceptance and thus to codification in international law. Any attempt at codification that failed to take into account the de facto inequalities between States would only give legal sanction to a practice which was questionable to say the least, particularly as there was no supranational authority capable of remedying the situation when the rules of international law were vioated.

71. Exhaustion of all means of peaceful settlement, exclusion of the use of force, and respect for the sovereignty and territorial integrity of States were the conditions to which recourse to countermeasures must be subject if abuses were to be avoided.

72. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, his delegation, aware of the complexity of the topic, believed that it was still premature to take a definitive decision on the nature of the legal instrument to be drafted. It should remain understood, however, that the basic objective was to succeed in elaborating binding rules. The legal status of the topic had occasionally been challenged, due to the lack of rules of international law establishing liability in cases in which no wrongful act had been committed. In his delegation's view, the topic's legal foundations lay in States' responsibility to answer for their actions and in their obligation to make good any harm caused. Under existing international law, it was up to each State to take all the necessary precautions to prevent the injurious consequences which might arise from dangerous activities. That was an obligation of vigilance which would benefit from being more precisely defined and developed.

73. The Commission should devote particular attention to the situation of the developing countries, which did not always have the financial and technical resources to enable them to carry out dangerous activities in conditions of

adequate safety. In any case, his country considered that the topic was sufficiently important to justify the Commission's according it priority.

74. Mr. KNOX (United States of America) said that, as the Commission itself had noted at its two most recent sessions, it was having difficulties in coming to grips with the topic of international liability for injurious consequences arising out of acts not prohibited by international law. In particular, the Commission had been unable to decide what type of instrument it should develop: a convention or a set of guidelines. On a number of occasions, his Government had expressed its preference for non-binding guidelines, given that that area of the law was still at an early stage of development. The Commission had of course decided to defer a final decision on that question until it had completed its work on the topic, and his delegation hoped that as the deliberations continued, it would become increasingly clear that guidelines were preferable to binding rules.

75. Noting that the Commission had decided to divide the topic into two parts - prevention and remedial measures - and to discuss prevention first, his delegation hoped that, by focusing its attention on drafting articles in respect of activities involving a risk of causing transboundary harm before it turned to remedial measures, the Commission might be able to make progress.

76. With regard to the "procedural" aspects of the topic, which were considered by the Special Rapporteur in his eighth report, he welcomed the draft provisions on notification and consultation. One of the Commission's goals in that area should be to recommend procedural guidelines for cooperation and negotiation between States, with a view to resolving potential problems before they caused actual harm.

77. His delegation remained concerned, however, that the Commission had still not clearly defined the scope of the topic. It was difficult to see how it could reach agreement on substantive rules on prevention before it had determined what activities would be covered. The Commission should focus on activities commonly thought of as ultra-hazardous. The further it strayed from that ground, the more it ran the risk of discussing, on the one hand, activities prohibited by international law, thus trespassing on the area of State responsibility, and, on the other, of considering activities which did not entail a risk of significant harm. In particular, clarification of the relationship of the topic to the related topic of State responsibility would, more than any other decision, strengthen the conceptual basis for the Commission's work.

78. Concerning the Commission's programme of work and its procedures, his delegation applauded the decision to suspend consideration of the topic entitled "Relations between States and international organizations", since it had long felt that such work was unnecessary. In addition, it had noted with great interest the decision contained in paragraph 369 of the Commission's report with regard to the consideration of new topics in the context of its

(Mr. Knox, United States)

long-term programme of work. Possible new topics should be discussed thoroughly at the forty-eighth session of the General Assembly on the basis of the Commission's recommendations.

79. His delegation also welcomed the new guidelines for the composition and working methods of the Drafting Committee, which should contribute to the effectiveness of that crucial body. Finally, he welcomed the Commission's efforts to streamline its report, which was now easier to read; that would undoubtedly help to promote a more fruitful relationship between the Sixth Committee and the International Law Commission.

80. Mr. CORELL (Sweden), speaking on behalf of the Nordic countries, said in connection with the organization of the Commission's work that those countries noted with appreciation that the Commission had continued to review its programme, procedures and working methods and had in several respects responded to suggestions made by the Nordic countries in previous years. The Commission had thus demonstrated that it was prepared to adapt its working procedures to ensure a more efficient use of the resources allocated to it. That was confirmed by the guidelines on the work of the Drafting Committee, and it was to be hoped that the Commission's decision to devote the first two weeks of its next session to the work of that Committee on the topic of State responsibility would lead to considerable progress on the first reading of the draft articles.

81. The Nordic countries also welcomed the Commission's efforts to restructure its annual report, efforts which were evident from its most recent report. The general overview of each topic was much clearer than before, and the way in which problems requiring guidance from the Sixth Committee had been highlighted (in chap. I of the report) was excellent. Unnecessarily long reports could also be avoided by, for example, making the summary of debates more compact and emphasizing trends of opinions. The Nordic delegations also agreed that it was counterproductive to present information on the consideration of topics to the Sixth Committee when only fragmentary results had been achieved.

82. The Commission had continued to concern itself with new topics which might be included in its long-term programme of work. In that connection, the Nordic countries considered that the topics chosen should respond to the most pressing needs of the international community and should be of a practical rather than theoretical nature. Moreover, their consideration should be amenable to completion within a foreseeable period of time. In view of the debate in the Sixth Committee on an international criminal court, the elaboration of a statute for such a court should be regarded as a matter of priority.

83. In conclusion, the Nordic countries considered that the way in which the Commission had conducted the work of its forty-fourth session and had structured its report had greatly facilitated the debate in the Sixth Committee: the Commission and its Chairman were to be commended for that.

The meeting rose at 5.35 p.m.